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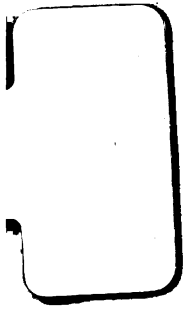

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

RAJAH VELLANKI VENKATA KRISHNA ROW. . . . . } PLAINTIFF;

AND

VENKATA RAMA LAKSHMI NARSAYYA AND OTHERS. . . . . } DEFENDANTS.

J. C.*
1876
Nov. 3.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Adoption by a Widow after succeeding as Heiress to her Son—Hindu Law in the Dravada District—Motives of Widow in adopting without written Authority of her Husband—Assent of Sapindas.

In a suit by an adopted son to recover the zemindary in suit (situate in the *Dravada* district), it appeared that the original zemindar having left a son the zemindary vested in him, that on his death a minor and unmarried it vested in the widow as heiress to her son, that she some years later adopted the Appellant without a written authority from her husband, but with the consent of his surviving sapindas, all requisite ceremonies being complied with:—

Held, that the adoption being in derogation of the adopted mother's estate, although she had taken the same in succession to her son and not to her husband, was valid.

Bhoobunmoyee Dabee v. *Ram Kishore Acharj Chowdhry* (1) distinguished.

Secondly, the High Court was wrong, upon the evidence, in holding that

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

(1) 10 Moore's Ind. Ap. Ca. 279.

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there had not been such an assent upon the part of the kinsmen as to shew that the act of adoption was done by the widow in the proper and *bonâ fide* performance of a religious duty.

The *Ramnad Case* (1) explained.

It would be dangerous to introduce into the consideration of adoption cases nice questions as to the particular motives, so long as they are neither corrupt nor capricious, operating on the mind of the adoptive widow.

APPEAL from a decree of the High Court at *Madras* (June 15, 1874), reversing a decree of the Civil Court of *Guntoor* (January 21st, 1873).

The suit in which the above decrees were made was brought against the above three Respondents, two of whom were the daughters and the third a very distant cousin of the deceased zemindar of *Gampalagudem*, by the Appellant, in the character of an adopted son of the deceased. The facts are stated in their Lordships' judgment, and need not be repeated here. The main question raised by the appeal was whether the adoption of the Appellant, which was found by both Courts to have been made after the death of the last male zemindar, by his mother and heiress, without the consent of her husband, but with the consent of all the male sapindas living at the time, was invalid, for the reason given by the High Court, viz., that the adoption did not appear to have been made from a proper religious motive.

The Appellant sought by his plaint to oust the two Respondents, the daughters of the deceased Rajah, from the zemindary and other property, real and personal, which belonged to the Rajah at the time of his death, and to which his natural son had succeeded as sole heir by Hindu law, and of which, on the death of their mother, the Government authorities had put them (the two daughters) into possession.

The judgment of the Civil Judge of *Guntoor*, on which the decree above-mentioned was based, found that the adoption was proved, and that the same was valid in law under the assent given by gnatis or kinsmen as alleged, although he stated at the same time, "that it was in the power of the Plaintiff to have cited further and better evidence of gnatis, and he has failed to do so."

(1) *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 Moore's Ind. Ap. Ca. 397.

On the 18th of June, 1874, the High Court pronounced its decree, reversing that of the Civil Judge. On the same day the Judges (*Morgan*, C.J., and *Innes*, J.,) delivered a written judgment, oral judgment having been delivered on the 10th of December, 1873, which, after finding on the evidence that a form of adoption had been gone through, proceeded as follows:

"We thought that it was not made out that there had been such an assent on the part of the kinsmen as to shew (to quote the words of the Privy Council judgment in the *Ramnad Case*) 'that the act was done by the widow in the proper and *bonâ fide* performance of a religious duty.'

"Upon this point of the purpose of the adoption, we may remark, that so far as the evidence discloses there is no ground for supposing that it had undergone any change between the period (immediately after the death of the son) at which the widow first entertained the intention of adopting, and the date at which the adoption actually took place, and to ascertain therefore what that purpose was, we should naturally look to the evidence of what took place immediately after the death of the son.

"The letters of the widow seem to shew that the object was to adopt the boy for the purpose of perpetuating the descent of the property in the same apparent line. The earliest letter of the 28th of September, 1854, is not in evidence, but the letter of the 12th of October of the same year in reply to it, recites it as expressing an intention on the part of the widow to 'constitute a boy in the family as heir to her' rights. There is no appearance of any anxiety or desire on the part of the widow for the proper and *bonâ fide* performance of any religious duty to her husband. Her object appears to have been to hold the estate till her death, and then continue the line in the person of Plaintiff, who as a matter of fact did not upon adoption, nor until his adoptive mother's death, seek to assume the position of an adopted son.

"Now all that the oral evidence shews, if materials of so scanty a character can be regarded as proving anything, is that the adoptive mother, as the second witness says, was anxious for a representative to be provided for her zemindary. The third witness says that she asked the sapindas to give her a boy, that the line of the family might be kept up. The fourteenth witness

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makes no mention of the purpose for which an adoption was desired.

"It appeared to us that in a case in which it was sought to divest the natural heirs, clear evidence ought to be afforded of the consent having been asked and obtained for a proper religious purpose.

"There is nothing in the evidence to shew that the want of a proper purpose at the time when the adoption was first thought of was supplied at any subsequent period prior to, or at the date of the adoption, and arriving as we did at the conclusion that the evidence as to what took place at the time at which the widow first thought of adopting was not only insufficient to shew a proper religious motive on the part either of the widow or the consenting sapindas, but rather tended to negative the existence of any such motive, we thought it was not safe to presume the existence of it at the time of the adoption, simply from the fact of the form of adoption having been gone through in the presence and with the assent of the sapindas. We thought therefore that the proper conditions for giving validity to such an adoption as that set up were altogether wanting, and on this ground reversed the decision."

Fitzjames Stephen, Q.C., and *Mayne*, for the Appellant:—

It is submitted that the judgment of the High Court is based upon a complete misapprehension of the remarks of the Judicial Committee in the *Ramnad Case*, and that their Lordships never intended to lay down that an adoption by a widow, in other respects valid, would be invalid unless it was supported by affirmative evidence of a particular state of mind in the adopting party. They referred to the judgment in the *Ramnad Case*, at page 442 of the 12th *Moore's* Indian Appeals, as to the consent of the sapindas having been sufficiently given; the question as to who are the sapindas whose consent is necessary having been decided in *Sri Raghunada* v. *Sri Brozo Kishoro* (1); see also in that case the dictum of Sir *Robert P. Collier* as to the *onus probandi* where a corrupt motive on the part of the widow is alleged, as invalidating an adoption. The Court below seems to think that you must look at

(1) Law Rep. 3 Ind. Ap. 154, 166.

the motive instead of the act. But you cannot make a man's civil rights depend on states of mind of third parties in this manner. They referred to *Abraham* v. *Abraham* (1). [SIR JAMES W. COLVILE referred to *Bhoobunmoyee Dabee* v. *Ram Kishore Acharj Chowdhry* (2)]. See page 311 of that report. Here was an act interfering with the estate of others. On the death of the last zemindar it vested in his mother as his heiress, in default of a widow, who would have had a preferential claim. The facts of this case differ entirely from that in 10 *Moore*. They are the same as those which the Privy Council hypothetically put forward in that case as justifying a totally different judgment; the same as it is submitted should be delivered in this case; see page 310. A widow, moreover, can by adoption divest others of an estate besides herself; in *Madras*, for instance, she is not the heiress of a man who dies leaving an undivided brother, but her adopted son will take in preference to such brother. Here, in the absence of an adoption, the widow takes as heiress of her deceased son; not merely a life estate, but a female estate of inheritance. The Respondents have no vested estates in remainder, such contingent rights of inheritance as theirs are always liable to be defeated. Certainly the widow who could defeat the inheritance of the deceased's brother, could also defeat the contingent interests of the daughters. And with regard to those sapindas who ranked before the daughters in order of succession, it is submitted on the evidence, as a matter of fact, that every single person who had any interest in this succession consented to the adoption. It is opposed to every principle of natural justice that those who have counselled and aided a boy in quitting his natural family and losing all his rights therein by adoption, should prevent his obtaining his rights in the adoptive family. An adoption once made cannot be unmade; if it be invalid, the invalidly adopted son is entitled only to maintenance. The motive of the widow is completely immaterial, from the very nature of the act which she performs. Her act is completely ministerial, she merely sets in motion a machinery created by others. Her natural protectors are the persons to judge as to the fitness of making an adoption, her motives in asking for that judgment are immaterial;

(1) 9 Moore's Ind. Ap. Ca. 185. (2) 10 Moore's Ind. Ap. Ca. 279.

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the responsibility for the adoption rests with the sapindas, and their motives, and not the widow's, are the motives (if any) which should be attended to: see page 442 of the above report of the *Ramnad Case*. There is here no suggestion of an improper motive on the part of the sapindas. [SIR JAMES W. COLVILE:—You are putting the case a little too high. Of course if there is authority from the husband the widow is not the active agent. But where there is no such authority, then in the *Dravada* country the widow herself takes an active part, and, with the consent of the sapindas, herself adopts.]

Leith, Q.C., and *Norton*, for the Respondents, the two daughters of the original zemindar:—

The question as to this adoption is now reduced to a dispute as to its validity and consequences. It is sought to extend the power of a widow to adopt beyond what has been decided in any known case in *Madras* or in the Privy Council, viz., to a case where there has been a descent from the original owner to a natural-born son who has survived his father for a period, and has in his turn been succeeded by his mother the widow. No doubt a power successively to adopt may be given by the husband; but here no power was given, and the question is whether on the death of the natural son, the widow can in the absence of such authority, adopt with the consent of the sapindas a son to the original owner: see p. 493 of the *Ramnad Case* cited above. "Again it appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen, proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred where a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites."

Moreover it is clear from the evidence and the judgments that

the adopted boy in this case was never in possession of the estate, that his adoption was never acted on, that he never resided with his adoptive mother down to her death (a period of three years) nor performed the funeral rites of his adoptive father. The adoption had not for its object the spiritual benefit of the soul of the husband of *Venkata Ramanayya*, but was made by her exclusively for temporal purposes, according to the judgment of the High Court. The boy never performed a single rite or ceremony under Hindu law and prescribed by the Hindu religion for the spiritual benefit of the deceased original zemindar. Further, he had attained his majority at the time of the adoption. The intention of the widow appears to have been to adopt to herself and not to her husband, for the ceremony of boring the ears, which fixes the caste of the boy, was performed by her maternal uncle, and evinced an intention to fix his gotra as that of her own and not of her husband's. Moreover, the alleged consent of the sapindas was not sufficient in reference to the facts and circumstances of the case. The consent of sapindas is required in order that they may not be divested of their interests and thrust out of the estate without their consent. This is especially the case where there is coparcenary. That is the main ground on which the consent of sapindas is required in the *Dravada* country, and therefore the religious object of the widow becomes of importance, she being, in the absence of her husband's authority, the main actor in an adoption. The right performance of the exequial rites and other ceremonies is the proper religious motive for an adoption. The case in 10 *Moore* is an authority that a widow cannot adopt a boy to her husband so as to divest any interest which was vested.

The counsel for the Appellants were not called upon to reply.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The case out of which this appeal arises is a suit in which the Appellant, claiming to be the adopted son of Rajah *Vellanki Venkata Ramanayya Row*, who was the penultimate zemindar of *Gampalagudem*, is seeking to recover that zemindary against the parties in possession. Those parties, the Respondents, are the

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daughters of the above-named, whom it will be convenient to call the original, zemindar; and it seems now to be admitted that, although put in possession by the Collector after the death of his widow, they have, in fact, no title; that they must have been so put in, either under the notion which the Government at one time entertained, that as to certain zemindaries in the Presidency of *Madras* they had a right to settle the succession, or under an erroneous impression that these ladies were the next heirs of the last zemindar. The impression would be erroneous, because it is clear that, the original zemindar having left a son, the whole inheritance vested in the latter, although he died afterwards an infant, and unmarried; that the widow took as heiress to her son; and that, failing her, his sisters, if they had a remote right to succeed as bundhoos (a question upon which their Lordships express no opinion whatever), could only so succeed after the sapindas, of whom there are several, had been exhausted. These ladies, however, being in possession, have, of course, a right to set up a *jus tertii*, or on any other sufficient ground to question the title of the party who is seeking to oust them from possession.

Of the issues settled in the cause, the first is the only one on which any question now turns. It is in these terms: "Whether the Plaintiff was adopted by the first and second Defendants' mother, and whether such adoption is in consonance with law?" It embraces the two points which have been argued before their Lordships. As to the facts, there is little or no dispute. The original zemindar died in 1849. He was succeeded by his only son, the last zemindar, who lived for five years after his father's death, and died in 1854, a minor, unmarried. According to the Hindu law his mother was his heiress, and was admitted as such, and took possession of the zemindary. It is also found by both Courts, and is now not contested, that some years after the death of the last zemindar, his mother adopted the present Plaintiff; that all the ceremonies required for such a purpose were complied with; and that the consent was obtained of all the surviving sapindas of the family of the original zemindar, who concurred in and sanctioned that adoption.

The two questions that have arisen upon the first issue are, first, whether the descent having been thus cast upon the natural-born

son of the original zemindar, there remained in his mother any power to adopt a son to her husband; and secondly, whether the adoption is bad upon the particular ground upon which the High Court, reversing the decision of the Lower Court, has proceeded in this case. It seems to their Lordships to be desirable to deal in the first instance with the first of these questions, since it goes to the general power of adoption.

In order to determine that question it is desirable to see what would, in such a case, be the power of a mother who had from her deceased husband an express power to adopt a son in the event of his natural son dying under age and unmarried. It has been fairly conceded that such a power would exist, and the authorities seem to be express upon the point. It is sufficient to read the following passage from Mr. *Macnaghten's* Principles and Precedents, at p. 80, vol. i.: "It is written in the Dattaka Mimànsa 'A man destitute of a son (aputra) is one to whom no son has been born, or whose son has died,' for a text of Sounaka expresses 'one to whom no son has been born or whose son has died, having fasted for a son, &c.;' but it seems to be admitted that a man having a legitimate son may not only authorize his wife to adopt a son after his death failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead; and it has also been ruled that authority to a wife to adopt in the event of a disagreement between her and a son of the husband then living will not avail, though authority to adopt in the event of that son's death would be valid." If then there had been a written authority to the widow to adopt, the fact of the descent being cast would have made no difference unless the case fell within the authority of that of *Chundrabullee,* reported in the 10th *Moore* (1); in which it was decided that, the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had so become vested by making an adoption, though in pursuance of a written authority from her husband. That authority does not govern the present case, in which the adoption is made in derogation of the adoptive mother's estate; and indeed expressly recognises the distinction.

(1) *Bhoobunmoyee Dabee* v. *Ram Kishore Acharj Chowdhry,* 10 Moore's Ind. Ap. Ca. 279.

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Such then being the law supposing the husband had given a written authority to adopt, we have to consider what, with reference to this particular property, was the law, there being no such authority.

The estate is admitted to lie in what is known as the *Dravada* country, and is therefore property to which the law, as settled by the *Ramnad Case* (1), applies. The general proposition which their Lordships, affirming the decision of the High Court of *Madras*, established in that case was that, according to the law prevalent in the *Dravada* country, a Hindu woman, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him. The judgment of the Committee, after declaring this to be the local law, goes on to deal with the foundation on which it rests, treating it as established by positive authority rather than by some supposed analogies to other parts of the Hindu law; and then proceeds to consider what constitutes a sufficient authority on the part of the husband's kindred,—a question to which reference will afterwards be made. Assuming the general proposition to be thus established, their Lordships see no reason why it should not apply to every case in which a widow might make an adoption under a written authority from her husband. They are therefore of opinion there is no ground for saying that because the estate descended to the son natural-born of the original zemindar, and the widow of the latter took it as heiress of her son and not immediately from her husband, the adoption made by her, if otherwise valid, therefore became invalid. These considerations seem to their Lordships to dispose of the first objection.

It is not necessary to consider in what way successive adoptions operate. It is sufficient to say that the law has established that they may take place.

Their Lordships will now consider the second question, being that which was really the *ratio decidendi* of the High Court of *Madras*. The judgment under appeal says, "We thought there was no reason to doubt the evidence of the fact of the form of adoption having been gone through, supported, as that evidence was, by written documents. . . . But we thought that it was not made out that there had been such an assent on the part of the

(1) 12 Moore's Ind. Ap. Ca. 397.

kinsmen as to shew, to quote the words of the judgment of the Privy Council in the *Ramnad Case* (1), 'that the act was done by the widow in the proper and *bonâ fide* performance of a religious duty.'" And then proceeding to examine the evidence of what took place immediately after the death of the son; and to consider the correspondence, it says, "The letters of the widow seem to shew that the object was to adopt the boy for the purpose of perpetuating the descent of the property in the same apparent line. The earliest letter of September 28th, 1854, is not in evidence, but the letter of the 12th of October of the same year, in reply to it, recites it as expressing an intention on the part of the widow to 'constitute a boy in the family as heir to' her rights. There is no appearance of any anxiety or desire on the part of the widow for the proper and *bonâ fide* performance of any religious duty to her husband. Her object appears to have been to hold the estate till her death, and then continue the line in the person of the Plaintiff, who, as a matter of fact, did not upon adoption nor until his adoptive mother's death seek to assume the position of an adopted son." It appears to their Lordships that the conclusions of fact which the learned Judges of the High Court have drawn from the correspondence and the other evidence in the cause are not quite correct; and that they have also given an interpretation and meaning to what was said by this Committee in the *Ramnad Case* which the particular passage in that judgment does not fairly support.

If we go back to the time of the son's death, we find that almost immediately after that event his mother entertained the notion of adoption; that she was admitted heir on the 24th of June, 1854; and on the 28th of September, 1854, wrote the letter referred to by the High Court, which clearly contemplated some kind of adoption. We have not the original of that letter, we have merely what is stated in reply to it by way of recital; and taking that to be correct, the High Court have insisted on her saying that she meant to "constitute a boy in the family as heir to" her rights. Their Lordships think that in dealing with a letter of this kind, written by a Hindu lady, it is desirable not to rest upon a minute criticism of the particular expressions used, but to look to what

(1) 12 Moore's Ind. Ap. Ca. 397.

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was the substance of the transaction. If, as was also suggested by Mr. *Leith*, in an argument founded on some of the subsequent ceremonies that were said to have taken place, she intended merely to adopt an heir to herself, there was really no ground why she should have convoked a family council, or have gone to the sapindas of her husband at all. The authority of the sapindas was only necessary in order to enable her to adopt an heir in the ordinary sense of the Hindu law,—an heir who should be heir to herself and husband, and capable of performing the religious ceremonies which are supposed to be for the benefit of the souls of both.

Again, some stress has been laid upon the fact of the delay; but, as has been already said, her first application was made as early as the 28th of September, 1854, and she was then told by the Collector (who seems at that time to have been considered to possess much larger powers in determining the succession to zemindaries than, as it has since been settled, he really had) that she had no power to adopt, and that she could not adopt. The purpose of adoption, however, remained in her mind, and the adoption actually took place in June, 1862, for she gave the Collector notice of it as early as the 27th of June, 1862. Yet even then the Collector repudiated the adoption, apparently proceeding upon what is the general law of the greater part of *India*, and not upon what has since been established to be the law in the *Dravada* district. And assuming that the permission of the Government was necessary to an adoption, he wrote, "The Government passed minutes on the 14th of April, 1855, to the effect that your making an adoption being illegal by reason of the absence of the consent of your husband, permission for the same would not be accorded;" and again, "Such being the case, the adoption you say you have now made being without authority, and at variance with Hindu law and the orders of the Government, the same is of no use. This adoption will not, therefore, be recognised, and this is written to inform you of the same." This continued resistance of the Government authorities to the adoption may, it seems to their Lordships, constitute a sufficient answer to any argument founded upon the facts, that there was no mutation of names, and that the adopted son did not, while the adopted mother continued to live,

enter ostensibly into the enjoyment of the estate or exercise those functions which, if his adoption had been recognised from the first, he would otherwise have exercised. That the non-mutation of names and the non-enjoyment of the estate by the son were contrary to the intention of the widow is shewn by the letter, in which she writes to the boy, "By reason of your not having yet returned from *Sauwarapetta*, whither you went to see your natural father and mother, the course of affairs here does not progress well. It is not, therefore, becoming that you should thus neglect, in spite of my having adopted you as my son and made you the rightful heir of my estate, real and personal. You ought to come soon and enter upon the possession of your mittah, devote your attention to largely improving the same, and at the same time maintain me and your servants, and take upon yourself all my troubles and cares. As I am a female, you should manage all affairs and abide by my instructions until you come of proper age." Her wish and intention seem to have been throughout to divest herself of her estate and to put the adopted son into the position which, upon the strictest construction of the law of adoption, he would have held. That intention was defeated by the unfortunate view which the Government authorities appear to have taken of her powers.

This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the *Ramnad Case?* (1) The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of a father-in-law would probably be sufficient, they said:—"It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence," not, be it observed, of the widow's

(1) 12 Moore's Ind. Ap. Ca. 397.

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motives but "of the assent of kinsmen, as suffices to shew that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bonâ fide* attained."

Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the sapindas; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that, at all events, such presumption should be made until the contrary is shewn.

Therefore it seems to their Lordships that on neither ground can it be said that this adoption was not consonant to law, and they must humbly advise Her Majesty to allow the present appeal, to reverse the decision of the High Court, and to affirm the decision of the Lower Court, with the costs of the appeal in the High Court. They think the Appellant ought also to have the costs of this appeal.

Solicitors for the Appellant: *Shaen, Roscoe, & Massey.*

Solicitors for the two first Respondents: *Gregory, Rowcliffes, & Rawle.*

NARAIN SINGH AND OTHERS . . . . . PLAINTIFFS;

AND

SHIMBHOO SINGH AND OTHERS . . . . DEFENDANTS.

J. C.* 1876 Nov. 3, 4.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Dispossession of second by first Mortgagee—Re-entry of Mortgagor after first Mortgage satisfied—Cause of Action.

In a suit brought in 1872 by the representatives of a second mortgagee to recover possession of the mortgaged land from the representatives of the mortgagor, it appeared that the second mortgagee had been placed in possession thereof in 1846 by decree of Court, but had in 1847 been dispossessed at the suit of the first mortgagees, upon whose being paid off in 1870 the mortgagor re-entered upon the land:—

Held (reversing the decision of the High Court of *Allahabad*), that such entry gave a cause of action to the second mortgagee, and that he was entitled to resume possession of the mortgaged land. The decree of the first Court, which was in favour of the Appellants, was also reversed, so far as it decreed interest upon the mortgage-money during dispossession.

APPEAL from a decree of the High Court at *Allahahad* (May 13, 1873), reversing a decree of the subordinate Judge of *Allygurch*, in the North-Western Provinces (Nov. 23, 1872).

The suit was brought on the 27th of July, 1872, by the Appellants, claiming as mortgagees, to get possession from the Defendants of a portion of mouzah *Lallpoor* in pergunnah *Garee*. The case, as set up by the Plaintiffs, was that the ancestors of the Defendants, having mortgaged the property to the ancestor of the Plaintiffs, one *Poohup Singh*, the latter, on the 31st of August, 1846, obtained a decree putting him in possession; that in October, 1847, some prior mortgagees then obtained a decree for possession and ousted him; and that in September, 1870, these prior mortgagees being paid off by the mortgagors, the latter were again put in possession; that the Plaintiffs, as heirs of *Poohup Singh*, claimed a right to possession by virtue of his decree, and in December, 1871, obtained an order for possession thereunder, but that on

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER.

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appeal the Appellate Courts held that they were not entitled to execution under that decree, and therefore they brought the present suit.

The defences set up by the Respondent *Shimbhoo Singh*, amongst others, were that one of the sons of *Poohup Singh*, named *Teeka Ram*, not having been joined as a Plaintiff, any rights which the Plaintiffs might have could not apply to more than four-fifths of the property; that according to the admission of the Plaintiffs their ancestor had been a year in possession, and they were therefore bound to give an account of their receipts in order to shew whether anything remained due on the alleged mortgage; that neither the mortgage deed nor a copy of it being produced, the claim could not be sustained, and, finally, he denied the fact of the mortgage, contending that if there had been one at all it was collusive, for the purpose of defrauding the prior mortgagees, and that, the property being ancestral real estate, the Defendants' father had no power to dispose of it.

Doyne, for the Appellants.

Graham, for the Respondent, *Shimbhoo Singh*.

1876 *Nov.* 4.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

In this case the Plaintiffs, as sons and heirs of *Poohup Singh*, a mortgagee, seek to recover possession of 20 biswahs of the zemindary right of mouzah *Lallpoor*. The Defendants in the suit are the representatives of the mortgagor. The Plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, *Poohup Singh*, "in that, under a mortgage deed, dated *Phagoon Badi*, 7th Sumbut, 1896, *Poohup Singh*, the ancestor of the Plaintiffs, having obtained a decree from the Sudder Ameen's Court, was put in possession on the 31st of August, 1846." Most of the Defendants admit the claim, but the Defendants, *Man Singh*, *Shimbhoo Girdharee*, and *Motee* put in an answer, by the second paragraph of which they admitted that under the former decree the Plaintiffs' ancestor was in possession for upwards of a year; but they set up, in the

fourth paragraph of the same written statement, that "the mortgage alleged by the Plaintiffs is wholly unfounded. The Defendants' ancestor did not receive the mortgage money from the ancestor of the Plaintiffs; and *Poohup Singh*, the ancestor of the Plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive *Asaram* and *Sheololl* of their mortgage money, obtained by deception a decree on the mortgage deed in suit; and the Defendants' father had, according to the Shasters, no right to transfer and waste the Defendants' ancestral property, without any legal necessity, to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the Plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the Plaintiffs' ancestor did obtain possession by virtue of a decree, and that he remained in possession for a year, the Defendants also, in the same written statement, alleged that the mortgage was collusive and a benamee transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the Defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the Plaintiffs' ancestor did get into possession on the 31st of August, 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, *Asaram* and *Sheololl*. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected, it was a mortgage bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the Plaintiffs to be put into possession.

It appears that the Plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the Plaintiffs as mortgagees a title to the land as against the Defendants, but it gave them no title as against the prior mortgagees, *Asaram* and *Sheololl*. When *Asaram* and *Sheololl* turned the Plaintiff's ancestor out of possession, it did not destroy his title and right to the land. It may

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have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to *Asaram* and *Sheololl*, but it did not destroy the right which the Plaintiffs obtained against the Defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues:—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the Defendants according to the Hindu law. The Judge says in his judgment: "It is apparent that Plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage deed, and the payment of mortgage consideration; and the fact of the decree having been made is admitted by the Defendants. Again, all the Defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of *Moulvie Inayut Alli*, pleader, *Choonnee Loll*, putwaree, and two other persons, both named *Hoolasee*, witnesses for Plaintiffs. The plea urged by Defendants must therefore be overruled; and they have failed to refute the claim." He therefore gave a decree in favour of the Plaintiffs.

Upon that an appeal was preferred by *Shimbhoo* alone to the High Court; and one of his grounds of appeal is that there was "no cause of action and foundation for the Plaintiffs' suit; neither the deed of mortgage nor the decree has been produced; the conditions agreed upon between the parties cannot be ascertained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st of April, 1872, could not give any legitimate cause of action. Nor did any right of action accrue to the Plaintiffs by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the Plaintiff by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of

possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the Plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the Plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the Plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the Defendants. The Court proceed: "The right of the Plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the Plaintiffs a title. The High Court proceeded: "The dispossession of *Poohup Singh* after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing Defendants." The High Court held that the Plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the Plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the Plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by *Poohup Singh*, the Plaintiffs' an-

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cestor. In the first place, as already stated, the written statement of the Defendants admits that there was that former decree. They say that "under the former decree the Plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when *Asaram* and *Sheololl*, the first mortgagees, brought an action against the second mortgagee, *Pertab Singh*, the ancestor of the Plaintiffs, and *Lulloo* and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of *Pertab Singh* against the zemindars was in evidence. The Sudder Court says: "The Plaintiffs sued *Lulloo* and others, zemindars of the above-named village, for possession on a mortgage bond dated the 18th Kower, 1859 Sumbut; but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. *Poohup Singh* also sued the zemindars on a mortgage bond, and obtained a decree which was upheld in appeal." There was a finding then in that case that *Poohup Singh* did sue the zemindars on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the Plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Moonsiff decided that they were entitled to have an execution. In that suit, *Shimbhoo*, who is the present Defendant, was one of the parties, and in that case the judgment was produced. The Moonsiff says: "The record of the case having been brought forward, it appears that the objection of the Defendants, judgment debtors," that is, of *Shimbhoo*, one of the present Defendants, "is that *Poohup Singh*, the original decree holder and deceased ancestor of the Plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the Plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to recover possession as mortgagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, within the jurisdiction of the *Iglass Tehselee*, valued at Rs.5000,"—the valuation is not a matter of importance,—"the principal amount of the mortgage loan, and to recover Rs.6999 15*a*. 0*p*. interest thereon, during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs.11,999." Now the Plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the Plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for Rs.6999 interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to recover possession as mortgagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs.5000, principal of the mortgage loan, and Rs.6999 15*a*. 0*p*. interest on the mortgage amount." Then he says: "Ordered that Plaintiffs' claim be decreed with costs against the Defendants, that the pleaders get their fees." Then he says:—"Subject matter of decree. Recovery of possession as mortgagees, over the entire 20 biswahs right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs.5000, the principal amount of the mortgage loan, and of Rs.6999 15*a*. 0*p*. interest on the mortgage amount for the period of the Plaintiff's dispossession; total Rs.11,999 15*a*. 0*p*." If by that decree the lower Court intended to give the Plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs.6999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court

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should be modified by confining the recovery of the Plaintiffs merely to the possession of the land. In that case, the Plaintiffs having got possession of the land, the question, as before observed, will remain open until the Defendants seek to redeem the land. Then the question will arise, how much is due to the Plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the Plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the Appellants are entitled to the costs of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent: *Oehme & Summerhays.*

RAM COOMAR COONDOO AND ANOTHER . PLAINTIFFS;

AND

CHUNDER CANTO MOOKERJEE . . . DEFENDANT.

J. C.*
1876
June 30;
July 1, 4;
Nov. 25.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Champerty and Maintenance—Agreement to share the Subject of Litigation, when against Public Policy—Non-liability of Stranger to the Record for Costs of Suit, in the absence of Malice and Want of Probable Cause.

The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mesne profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent., and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and therefore conducted the appeal in his own interest.

In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended, (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damage from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—

Held, that the English laws of maintenance and champerty are not of force as specific laws in *India*.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.

Such agreement created no legal privity between the Appellants and the

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Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded; nor does it establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.

An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause.

Cotterell v. *Jones* (1) approved.

APPEAL from a decision of a Division Bench of the *Calcutta* High Court (May 28, 1874), reversing the decision of *Macpherson*, J. (March 30, 1874), which dismissed the suit of the Appellants against the Respondent.

The circumstances out of which the suit of the Appellants arose are detailed in the judgment of their Lordships.

The agreement of the 17th of July, 1867, which was very lengthy, was executed by *McQueen* and his wife and by the Respondent, and attested.

It recited the title, or alleged title, of the *McQueens* to the land in question, the conveyance by *Beebee Bunnoo* to the father of Appellants, the cesser of the Appellants' title on the death of *Beebee Bunnoo*, and their illegal retention of the land notwithstanding, and that they (the *McQueens*) were desirous of establishing their right to the said land, and recovering the same, but that having no funds wherewith to adopt or commence legal proceedings, they had applied to the Respondent to assist them in commencing and conducting the necessary proceedings, and to advance them sums of money necessary for that purpose until the termination of the suit.

It then recited that the Respondent, in consideration of the covenants, conditions, and agreements therein contained, and of a clear one-third share of what should be recovered by the suit from the Appellants, their heirs, or representatives, "in respect of the said land so illegally held by them as aforesaid," or otherwise in respect of the said proceedings so to be commenced as aforesaid, as and by way of remuneration for his trouble, had agreed to assist the *McQueens*, and to make such payments and advances, and further, "as the said parties hereto of the first part have no means

(1) 11 C. B. 735.

whatsoever" to pay to the *McQueens* and the survivor monthly Rs.150 for their support until the final determination of the suit.

The operative part of the deed was in substance as follows:—

The *McQueens* appointed the Respondent their attorney, agent, and mooktear, to institute and prosecute all necessary proceedings against the Appellants, their heirs, or representatives, or any other persons, to sign all documents, receive all moneys, and take possession of all lands to which the *McQueens* might become entitled under any decree and (subject, however, to the consent in writing of the *McQueens*) to compromise suits.

The Respondent then covenanted to commence, conduct, and manage the suits against the Appellants, and make the advances necessary and the monthly payments before mentioned.

It was then declared that the Respondent should in the first place, out of the moneys, or from sale of the land to be recovered from Appellants, retain his advances and disbursements, with 12 per cent. interest, and in the next place, as remuneration for his trouble and risk, retain one-third of the clear net proceeds of such suits after all such payments, with interest as aforesaid, and pay over the other two-thirds to the *McQueens* or the survivor.

The *McQueens* then covenanted not to intermeddle with, but to aid Respondent in the prosecution of the said suits to be commenced as aforesaid, and that so long as Respondent should carry them on and pay the Rs.150 monthly the power of attorney should be irrevocable.

Then followed a proviso that so long as *John McQueen* should give his whole attention to instituting, prosecuting, and bringing to a termination the suits to be instituted as aforesaid, he (*McQueen*) should have the management and conduct thereof, under the control of the Respondent, and the power of attorney should so far remain in abeyance.

It was also provided that if the *McQueens* wished to revoke the said power they might do so on repaying Respondent his advances with interest and Rs.2000, as liquidated damages, and that the indenture should be void in case Respondent failed to make the necessary advances or pay the monthly allowance of Rs.150, and in that case that all advances and payments should be deemed liquidated damages payable to the *McQueens*.

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And the *McQueens* were thereby empowered to compromise the suit with the Appellants, but with the consent of Respondent, his heirs, &c., and if the sum accepted should be sufficient to repay the sums advanced by him with interest: and the Respondent was to have one-third of the clear net balance after deducting his advances.

On the 8th of August, 1867, a suit was commenced by and in the name of the *McQueens* in the *Hooghly* Court against the Appellants to recover three beegahs of land. It was dismissed with costs by the Judge of the *Hooghly* Court. In its course the Appellants, having come to knowledge of the above agreement, subpœnaed the Respondent to produce it, which he did, admitting the execution thereof. An application under sect. 73 of Act VIII. of 1859, to add him as a party to the suit, was rejected by the Judge of *Hooghly*, on the ground that the agreement gave him "no present interest." Subsequently the High Court gave the Appellants a decree for possession of the land in question. A writ for mesne profits was also decreed in their favour.

On the 25th of June, 1872, the former decree was reversed by Her Majesty in Council; and thereafter the latter was set aside or reversed.

After the decree of the High Court in favour of the *McQueens*, an order for execution was issued on their application, and they were put into possession of the lands in question. On the 10th of July, 1869, the High Court directed the Appellants to be restored to possession (on giving security) unless the *McQueens* gave security for what they might receive pending the appeal and for costs. Thereafter the Respondent gave security on their behalf for Rs.12,000. On the 28th of September, 1871, the Respondent entered into an agreement with the *McQueens* to purchase all their interest in the said lands, and their rights therein, and in the appeal to the Privy Council and in the suit for mesne profits. On the 14th of September, 1872, after the decree of the Privy Council, the Appellants were restored to possession of the land in question.

On the 9th of January, 1873, the Appellants filed their plaint against the Respondent, claiming Rs.25,202 as the loss and damage alleged to have been sustained by them from or by reason of alleged

wrongful and injurious acts by the Respondent. The pleadings are sufficiently stated in the judgment of their Lordships. On the 30th of May, 1874, *Macpherson*, J. (in ordinary original civil jurisdiction), gave judgment, and while deciding that no malice had been proved against the Respondent, and that it could not be said that there was an absence of reasonable or probable cause for the suits by the *McQueens*, nevertheless decided in favour of the Appellants upon the following grounds:—"Apart from all precedent, and even if it were doubtful whether the agreement of 1867 were actually illegal and void, it seems to me perfectly fair and just that in a case such as this, the Defendant should be held responsible to the Plaintiffs for the loss they have sustained by reason of the suits which the Defendant (substantially for his own benefit) has maintained against them;" adding, "the damages recoverable from the Defendant are those which might have been recovered from the *McQueens* had they been persons of means, and the Defendant had not intermeddled in the suit." He decreed in favour of the Appellants. The High Court in its appellate jurisdiction (*Couch*, C.J., and *Pontifex*, J.), on the 28th of May, 1874, reversed this decree, and dismissed the suit without costs. The Chief Justice said that there was no evidence of malice on the part of the Respondent, and no want of reasonable or probable cause for the action of the *McQueens*, adding: "So far as there is any evidence in the case, I think that there is no ground for holding that an action for malicious prosecution, and without reasonable or probable cause, can be maintained against the Defendant."

Then with reference to the question of maintenance, the Chief Justice said:—

"The case has been presented in the plaint in another form, viz., as an action for what is called maintenance, for maintaining a suit which was brought by *McQueen* and his wife. Now we have to see whether such an action can be maintained in *India*. When we look at the ground upon which it is maintainable in *England*, it will be seen that the cases where it has been allowed will not apply in this country, and cannot be considered as being the law here," and after some reference to the English law he continues:—

"On the same principle an action for maintenance was allowed

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in *England*, but that does not apply to *India*. It has always been admitted that the English common law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply in the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country is that they are contrary to public policy, or, as described by the Judicial Committee in *Fischer* v. *Kamala Naicker* (1), are considered to be immoral and against public policy, and such as the law will therefore not enforce here and will treat as void. But if this is the ground on which agreements of this kind are void in *India*, as I consider it to be according to the decision on this subject in *India*, and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground on which an action is allowed in *England*, viz., that the Defendant has been guilty of an offence by which the Plaintiff has suffered damage, does not exist here. When we examine the English law, and see the ground of action there, I think that in this country an action for maintenance cannot be brought. This part of the case of the Plaintiffs in this suit is therefore unsupported."

The Chief Justice also pointed out that if Respondent, as alleged by Appellants, had an interest in the suit under the agreement, it could not be treated as void, and that Respondent did no wrongful act, and that the Appellants had simply mistaken their remedy, adding,—

"It appears to me that in this case either the Defendant ought to have been required to be a Plaintiff with *McQueen* and his wife, or that he ought to have been called upon to give security for costs. The Court having erroneously refused to do that, there ought to have been an appeal. The Plaintiffs have omitted to take the course which the law prescribed, and they cannot remedy it by bringing an action when there is no principle of law on which it can be sustained."

(1) 8 Moore's Ind. Ap. Ca. 170.

Leith, Q.C., and *Doyne*, for the Appellants:—

The contract contained in the indenture of agreement of 1867 being clearly champertous, the Respondent thereby made himself in effect and substance a party to the suit interested in its result, and was therefore liable for the costs of and damages sustained by the Appellant, in the same manner as if he had expressly purchased a one-third interest in the subject of suit, and appeared as a co-Plaintiff on the record. The true test of liability is not, as the Chief Justice put it, whether champerty is or is not an indictable offence. The distinction drawn by the Chief Justice, that while champerty is in *England* a criminal offence, in *India* it is not, is immaterial. A champertous agreement constitutes a wrong and an offence, though not a criminal offence, and an action may be brought by the party injured: see *Fischer* v. *Kamala Naicker* (1); *Grose* v. *Amirtamoye Dossee* (2). These cases establish that a speculative bargain of this character, a gambling in litigation, is contrary to public policy, immoral, and void. [SIR MONTAGUE E. SMITH:—The transaction here savours of champerty. But it is not contrary to public policy that people having a good claim should be assisted in some way. That a bargain is unconscionable between the parties, or contrary to public policy, gives no right of action to third parties.] But see *Mulla Jaffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (3); *Soondaree Chowdhrain* v. *The Court of Wards* (4); *Pechell* v. *Watson* (5); *Hilton* v. *Woods* (6); *In re Jones* (7). Under the circumstances of this case the Respondent, being substantially a party to the suit, was liable to be made to pay the Appellants' costs of it which had been occasioned by his wrongful and injurious acts, springing from this champertous and illegal agreement, and he is liable in this suit in the same manner as he would have been in the ejectment suit had he been added as a party, or had it been proved therein that he was substantially and to all intents and purposes the Plaintiff. For under the agreement the *McQueens* denuded themselves of all right and

(1) 8 Moore's Ind. Ap. Ca. 170.
(2) 4 Beng. L. R. O. J. 1.
(3) 7 Madras H. C. Rep. 128.
(4) 20 Suth. W. R. 446.
(5) 8 M. & W. 691.
(6) Law Rep. 4 Eq. 432.
(7) Law Rep. 6 Ch. 497.

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interest in the property in the suits. It was the duty of the Respondent, as the assignee of all the interest in those suits and property, to have come forward and substituted himself on the record: see *Bamasoondery Dossee* v. *Anundololl Doss* (1). The Appellants unsuccessfully attempted, under sect. 73 of the *Procedure Code*, to bring the Respondent on the record, but it is submitted that their right, admitted as it is by the judgment under appeal to have existed during the pendency of the former suit, to recover from the Respondent the costs and damages to which they have been put by his conduct, was not affected or put an end to by the erroneous refusal of the Judge to grant their application under sect. 73. The Division Bench was wrong in holding that an appeal from that order of refusal should or could have been allowed, and that the non-allowance thereof has deprived the Appellants of their right to relief in this suit. The intention of sect. 73 was to enable persons to put themselves before the Court whose interests were likely to be prejudiced by the result of the suit, but its terms do not extend to proceedings *in invitum*, cases where it is sought to compel an unwilling person to be placed on the record in order that he may be rendered answerable for costs: see *Ridnath Sahoy* v. *Gopee Sahoo* (2); *Kalee Pershad Singh* v. *Joy Narain Roy* (3); *Joygobind Doss* v. *Gouree Pershad Shaha* (4). [SIR ROBERT P. COLLIER:—The section does not seem to me to apply to a case where the object is to substitute a real for a nominal Plaintiff.] No appeal lies for any order under sect. 73: see sects. 315 and 363, and note by Mr. *Broughton* to the latter section in his edition of the *Civil Procedure Code*. [SIR MONTAGUE E. SMITH:—Would there not have been a general equity of the Court either to have put the Respondent on the record or to have restrained proceedings until security was given?] See last section of the Code. There was no power to bring him before the Court under sect. 73, and therefore it could be done under no other authority. The section is chiefly to enable intervenors to bring themselves before the Court: see *Joygobind Doss* v. *Gouree*

(1) Bourke's Rep. O. C. J. 45; and again on appeal, p. 96.
(2) 14 Suth. W. R. 90.
(3) 11 Suth. W. R. 361, 364.
(4) 7 Suth. W. R. 202.

Pershad Shaha (1); *Saroda Pershad Mitter* v. *Kylash Chunder Banerjee* (2); *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (3). [SIR MONTAGUE E. SMITH:—If an action lies under the circumstances of this case, sect. 73 does not take it away, expressly or impliedly. SIR ROBERT P. COLLIER:—And if the bargain were champertous and the Respondent took nothing by it, he would not be entitled to be made a Plaintiff. SIR BARNES PEACOCK:—He did no wrong to the Appellants in lending his money at 12 per cent. to the *McQueens;* and unless there was a wrong there could be no foundation for this suit.] See *Bamasoondery Dossee* v. *Anundololl Doss* (4), *Evans* v. *Rees* (5), and cases therein cited. [SIR ROBERT P. COLLIER referred to *Hayward* v. *Giffard* (6), a judgment of Lord *Abinger*, to the effect that the Court might interfere by motion.]

Cowie, Q.C., and *Bowring*, for the Respondents:—

In order that the Appellants may succeed, one or other of the following propositions must be made out:—1. That there was a champertous agreement amounting to an offence against the law which resulted in special damage to the Appellants, giving them a right of action. 2. That the interest of the Respondent in the unsuccessful suits was of a character which made him if not sole real Plaintiff, at any rate one of the real Plaintiffs; and that he could not be brought on the record or reached under the provisions of the *Civil Procedure Code.*

Taking the second point first, had the Respondent an interest when the *McQueens* first brought their suit? If he had, then champerty and maintenance are at an end. [SIR MONTAGUE E. SMITH:—Not if the consideration for the interest was a champertous one.] No doubt the effect of the agreement is the real point; and according to its true construction it is submitted that the Respondent had an interest in the nature of what a Court of Equity would call a mortgage. The *McQueens* are treated in the agreement as still entitled to the property, but as regards two-thirds of it they

(1) 7 Suth. W. R. 201.
(2) Ibid. 315.
(3) 9 Suth. W. R. 309.
(4) Bourke's Rep. O. C. J. 45; and on appeal, 96.
(5) 2 Q. B. 334.
(6) 4 M. & W. 194.

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mortgaged it to the intent that the mortgagee should carry on the suit. They could therefore at any time have transferred the mortgage, and thus have eliminated the Respondent's interest so far as the two-thirds were concerned. Here is a partial assignment before action brought; the Plaintiff is an assignor who does not disclose his partial assignment, but pending the suit and before decision, the fact of a partial assignment having been made comes to the knowledge of the Defendants. It was then their business to make an application to the Court (which they did make) that this partial assignee should be made a party to the suit. The Judge refused that application on the ground (perhaps an erroneous one) that the said assignee had no interest. There was a cross appeal by the present Appellants to the High Court against this order; but the High Court in its judgment does not refer to it.

At the hearing of the appeal there was a resettlement of issues, and the parties suggested their issues, and no mention was made of adding the Respondent as a party. It is argued on the other side in reference to sects. 73 and 363 of Act VIII. of 1859, and *Ridnath Sahoy* v. *Gopee Sahoo* (1), that the Courts in *India* are so tied up by legislation that they cannot add a party to the record unless he comes forward as a voluntary intervenor. But every Court has a discretion to say whether the right parties are or are not before it in any given suit; and any order made in the exercise of that discretion must necessarily be open to appeal, for it affects the merits of the suit.

With regard to the first point, no instance can be found in which such an action as the present has been supported except under precisely similar circumstances to those which support an action for malicious prosecution. There is no authority either in *England* or in *India* for the proposition that an action lies against a man merely on the ground that he was substantially the Plaintiff in an unsuccessful suit by which the party complaining has been put to costs and expenses. The ground of such an action as this is not the champertous or maintenous nature of the agreement, but the malice, the misuse or abuse of civil process; the element of champerty is immaterial, except as between the parties to the agreement. Such an action as this was not contemplated in the ancient

(1) 14 Suth. W. R. 90.

statute law of this country: see *Statute of Westminster* 1 (3 Edw. 1, c. 25), Revised Edition of Statutes, vol. i. p. 22; *Statute of Westminster* 2 (13 Edw. 1), c. 49, *Ibid.* p. 72; 28 Edw. 1, c. 11, *Ibid.* p. 105. These statutes, which were mostly in the form of answers to petitions, were only declaratory of the common law, which had been neglected or abused. 33 Edw. 1, *Ibid.* p. 111, puts these actions on the ground of malice. See also 20 Edw. 3, c. 4, *Ibid.* p. 172. Then 32 Hen. 8, c. 9, *Ibid.* p. 481, implies that something *malum in se*, corrupt or illegal, must be the ground of the action. See observations thereon by Lord *Coke*, *Co. Litt.* fo. 368 b, 369 a, and *Comyns'* Digest, tit. "Maintenance," A 5, citing *Coke's* Second Institute, p. 208. See also Year Book, 11 Hen. 6, fo. 11. There is not a trace in the books since 11 Hen. 6, that an action would lie in respect of the abuse of civil process in the absence of those elements which must be averred in an action for malicious prosecution. In *Pechell* v. *Watson* (1), which is relied upon as an authority for this action, there were two counts, (*a*) similar to the ordinary count for instigating a malicious prosecution, (*b*) the holding and maintaining an action already commenced. Both counts were held good. See also *Cotterell* v. *Jones* (2); *Savile* v. *Roberts* (3); *Gregory* v. *Duke of Brunswick* (4). There must be a conspiracy, a wrongful act in pursuance of it, and damage to the Plaintiff. *Savile* v. *Roberts* (3) shews that an action of this kind is not to be favoured. See also *Co. Litt.* fo. 161 a, *Hargreave's* note; *Flight* v. *Leman* (5); *Hawkins'* Pleas of the Crown, vol. i., pp. 454–463; *Findon* v. *Parker* (6). [SIR BARNES PEACOCK:—This suit is in reference to lands situate in the zillah of *Hooghly*, with regard to which no distinction exists as to the legal and equitable title. Courts of Equity have held that the doctrine of maintenance does not apply to suits in Equity.] See *Knight* v. *Bowyer* (7); *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naicker* (8). The statute law of *England* does not apply to the Mofussil. It cannot be said that because this suit happened to come within the local jurisdiction of the High Court,

(1) 8 M. & W. 691.
(2) 11 C. B. 713.
(3) 1 Ld. Raym. 374; see also 1 Salk. 14.
(4) 6 Man. & G. 205.
(5) 4 Q. B. (N.S.) 883.
(6) 11 M. & W. 675, 682.
(7) 2 De G. & J. 421, 443, 4.
(8) Law Rep. 1 Ind. Ap. 242, 264.

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therefore the English law of champerty and maintenance is to apply to an agreement relating to lands in the Mofussil, and to proceedings taken in the Mofussil Courts. Both as regards English common law and English statute law, relating to this subject, the question arises whether they are applicable at all. Were they included in the law introduced in 13 Geo 1. The test is the applicability of such law to the circumstances of the people; and they are no more applicable to Hindus within than to those without the *Mahratta* ditch. Besides, by English law the consequences of a champertous agreement would be the forfeiture of the subject of agreement; and that forfeiture the High Court would have no jurisdiction to give effect to in the case of lands situate at *Hooghly*. [SIR BARNES PEACOCK referred to *Wood* v. *Griffith* (1).] Further, this is a question between Hindus, arising out of a contract, and must be governed by Hindu law, or by equity and good conscience, whether in the Mofussil or otherwise. This is not a champertous contract constituting an offence against Hindu law. Nor can malice be implied by law from the nature of the agreement; it must be proved in fact. See *Grose* v. *Amirtamayi Dasi* (2); *Pitchakutti Chetti* v. *Kamala Nayakkan* (3); *Ramrav Khanderav* v. *Govind Pandshet* (4); *Damodhar Madhavji* v. *Kahandas Narandas* (5); *Dungey* v. *Angove* (6); *Cockle* v. *Whiting* (7).

Leith, Q.C., replied:—

The common and statute law of *England* can only be applied so far as it prevailed in the late Supreme Court of *Calcutta*, whither it was imported by the charter of 13 Geo. 1. The *Mayor of Lyons* v. *East India Company* (8) established that there were exceptions from that importation, viz., where the law was local, or unsuited to the condition of the country. But is there anything in the condition of the people of *India* to exclude the application of the law of champerty and maintenance? That law is based on general principles not confined to English law, or adapted simply to the English people. In 21 Geo. 3, c. 70, s. 17, and Reg. III. of 1793, s. 21, Reg. IV. of 1793, s. 15, there is an omission of "contract"

(1) 1 Sw. 56.
(2) 4 Beng. L. R. O. C. J. 1.
(3) 1 Mad. Rep. 153.
(4) 6 Bomb. A. C. J. 63.
(5) 8 Bomb. O. C. J. 1.
(6) 2 Ves. Jun. 304.
(7) 1 Russ. & My. 43.
(8) 1 Moore's Ind. Ap. Ca. 176.

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from the subjects to be regulated by Hindu law as between Hindus. Then, as regards the English statutes cited on the other side, at common law, before and after those statutes, an action is maintainable on the ground of its being unlawful to enter into an agreement which is champertous, or in maintenance of a suit then pending. In *Pechell* v. *Watson* (1) there was no allegation of want of reasonable and probable cause. It shews that the common law was still in force, and an action could be framed without regard to the statutes. It is a principle not merely of English law, but of general application, that champerty makes an agreement unlawful. The other side have referred to *Madras* and *Bombay* cases, but in *Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (2), *Holloway*, J., treats the principle as established. Then as regards proving malice in fact, no distinction can be drawn between a man's intention to endamage another, and the thrusting of himself into a suit in which he has no interest, and which results in damage to that other, as a necessary consequence of his conduct. See *Harrington* v. *Long* (3). Such an agreement is a gambling transaction, and has constantly been held to be unlawful by the Courts in *India*. The first case is in 1825, *Ram Gholam Sing* v. *Keerut Sing* (4). Then comes *Brijnerain Singh* v. *Teknerain Singh* (5); *Zuhooroonnissa Khanum* v. *Russick Lal Mitter* (6); *Syed Keramut Ali* v. *Sumbhoonath Mitter* (7); *Maharajah Mohessur Buksh Singh* v. *The Government* (8); *Andrews* v. *Maharajah Sreesh Chunder Raee* (9); *Kishen Lal Bhoonick* v. *Pearee Soondree* (10); *Panchcourie Mahtoon* v. *Kalee Churn* (11); *Sheikh Abed Hossein* v. *Lalla Ram Sarun* (12); *Juggessur Coowar* v. *Prossono Coomar Ghose* (13); *Grose* v. *Amirtamayi Dasi* (14).

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This suit was instituted by the Appellants, who were the suc-

(1) 8 M. & W. 691.
(2) 7 Mad. H. C. 128.
(3) 2 My. & K. 590.
(4) 4 Select Rep. 12.
(5) 6 Select Rep. 131.
(6) 6 Select Rep. 298.
(7) S. D. A. 1847, 423.
(8) S. D. A. 1848, 659.
(9) S. D. A. 1849, 340.
(10) S. D. A. 1852, 394.
(11) 9 Suth. W. R. 490.
(12) 13 Suth. W. R. 427.
(13) 1 Ind. Jur. (N.S.) 282.
(14) 4 Beng. L. R. 1.

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cessful Defendants in two former suits brought by one *McQueen* and his wife against them, to recover from the Defendant, *Chunder Canto Mookerjee*, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which *McQueen* and his wife, by reason of their poverty, were unable to pay.

The principal suit of the *McQueens* (the other being for mesne profits only) was brought in the *Hooghly* Court to recover from the present Plaintiffs some lands in *Hooghly*, which their father had purchased of one *Bebee Bunnoo*.

Mrs. *McQueen* was the illegitimate daughter of one *McDonald* and *Bebee Bunnoo*, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now Plaintiffs in that suit was that *Bebee Bunnoo* was either the real owner, or had been allowed by *McDonald* to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The principal Sudder Ameen held the suit to be barred by limitation, and dismissed it. The High Court (finding that *Bebee Bunnoo* had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then Plaintiffs, the *McQueens*.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then Defendants (the now Plaintiffs) should have their costs in *India*, and of their appeal to Her Majesty.

These costs amounted to a large sum, and the *McQueens* were unable to pay them.

The connection of the Defendant *Mookerjee* with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the *McQueens* and *Mookerjee*, which recited an apparently good title of the former to the property. By this agreement *Mookerjee* was appointed the attorney and mooktear of the *McQueens* to conduct

the litigation against the present Plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs.150 per mensem to the *McQueens* for their support during the pendency of the proceedings. On the other side they agreed in effect that *Mookerjee* should have the management of the suit, they however assisting him, unless it happened that *McQueen* could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of *Mookerjee*."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, *Mookerjee* should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the *McQueens*.

This power of attorney was made irrevocable, unless upon the terms that the *McQueens* should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs.2000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by *Mookerjee*.

It appears that after the present Plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the *McQueens* obtained possession of the property. The Court having ordered the possession to be restored, unless the *McQueens* gave security to the amount of Rs.12,000 to repay what would be due in case the decree should be reversed, the present Defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, *Mookerjee* purchased of the *McQueens* all their interest in the principal suit, and the suit for mesne profits, for Rs.22,000, out of which he was to deduct Rs.12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former suit the now Plaintiffs—upon the agreement between *Mookerjee* and the *McQueens* coming

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to their knowledge—applied to the Judge to have *Mookerjee* made a party to the suit under the 73rd clause of Act VIII. of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the *McQueens*, the present Plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the Plaintiffs being in lawful possession as owners of the property in question, the Defendant, knowing this was so, maliciously conspired with the *McQueens* to bring a suit in their names to take the possession from him, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the *McQueens*, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the Plaintiffs," in the names of persons who had no right, and were without means to pay the costs. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts shewing the Defendant's connection with them, alleges that "the litigation was instigated and carried on by the Defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the Defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice *Williams* in *Cotterill* v. *Jones* (1):—

"It is clear no action will lie for improperly putting the law in

(1) 11 C. B. 735.

motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in *India* on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the Defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the Plaintiffs. The terms of the agreement, and his large expenditure, shew that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the *McQueens*, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then Plaintiffs. Indeed, it was properly admitted at their Lordships' Bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the Bar, which, stating them generally, are:—

1. That the agreement and acts of the Defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the Plaintiffs have suffered special damage from them.

2. That the Defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in *England*, have been introduced into and form part of the law of *India*, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the Bar, and it certainly appears from them that the views of the Courts

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have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper Plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gholam Sing* v. *Keerut Sing* (1)).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Sing* v. *Teknerain Sing* (2)).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. *Tucker*, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhooroonissa Khanum* v. *Russick Lal Mitter* (3)).

In a short note of a similar case in 1849 the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the Plaintiffs." (*Andrews* v. *Maharajah Sreesh Chunder Raee* (4)).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder Ameen had dis-

(1) 4 Select Reports, 12.
(2) 6 Select Reports, 131.
(3) 6 Select Reports, 298.
(4) S. D. A. 1849, Beng. 340.

missed a suit because the Plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir *R. Barlow* says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the Plaintiffs." Mr. *Welby Jackson*, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that as between a Plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognise and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoonick* v. *Pearee Soondree* (1)).

This case appears to have been generally regarded as a leading decision. Mr. Justice *Glover* so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal: *Panchcouree Mahtoon* v. *Kalee Churn* (2). In this same case, however, Mr. Justice *Macpherson* said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in *India* in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another* v. *Amirtamayi Dasi* (3), which was the

(1) S. D. A. 1852, Beng. 394. (2) 9 Suth. W. R. 490.
(3) 4 Beng. L. R. 1.

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case of a contract of a champertous character made by a Hindu widow, Mr. Justice *Phear*, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in *England* is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in *India*, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief Justice (Sir *Barnes Peacock*) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice *Macpherson* agreed with Mr. Justice *Phear* in thinking that the agreement was void, as being against public policy.

Mr. Justice *Holloway* in a case which came before the High Court of *Madras* in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice *Holloway* on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (1)).

This opinion of Mr. Justice *Holloway* seems to be directly opposed to the view expressed by Chief Justice *Scotland* in delivering the opinion of the High Court of *Madras* in a former case (*Pitchakutti Chetti* v. *Kamala Nayakkan* (2)). The Chief Justice there says:—"Maintenance and champerty are made offences by the common and statute law of *England*, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law

(1) 7 Mad. H. C. R. 128. (2) 1 Mad. H. C. R. 153.

can properly be applied in perfect consistency with the Hindu law relating to contracts. (See 1 *Strange's* Hindu Law, p. 275.)"

The passage in *Strange* alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of *Bombay, Damodhar Madhavji* v. *Kahandas Narandas* (1), *Westropp*, C.J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the Mofussil.

To return to the *Bengal* Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soondures Chowdhrain* v. *The Court of Wards* (2), the Court (Sir *R. Couch* being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer* v. *Kamala Naicker* (3). He also referred with approval to the remarks of Mr. Justice *Holloway* as to the mischievous effects of such agreements in *India*.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice *Macpherson* was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson* (4), that the present suit might be maintained.

In the judgment of the High Court delivered by Sir *R. Couch*, C.J., reversing Mr. Justice *Macpherson's* decree, the Chief Justice says: "It has been always admitted that the English Common Law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply to the Mofussil, whatever

(1) 8 Bomb. H. C. Rep. O. J. 1.
(2) 20 W. R. 446.
(3) 8 Moo. Ind. Ap. Ca. 170.
(4) 8 M. & W. 691.

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question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 *Moore*), are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in *India* so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in *England*."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case reported in the 8th *Moore*, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations: "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in *England;* but they have been properly regarded in *India* as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made:—

"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty being part of the statute law of *England*, has of course no effect in the Mofussil of *India;* and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts of *England*. On the other hand the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in *India;* and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the Mofussil has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to

(1) Law Rep. 1 Ind. Ap. 241.

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act in this manner. Before the acquisition of *India* by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in *England* in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of *India*, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from *India* of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons* v. *The East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the Defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into *India*, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circum-

(1) 1 Moore's Ind. Ap. Ca. 176.

stances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in *India*, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the *McQueens* if their suit had been successful; but assuming this to be so, the Plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the Defendant for the losses and costs of the litigation. By the law of *India*, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding

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that the action of the Plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the Defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in *England* or *India*. It may be assumed that, under the first agreement, the Defendant acquired a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, *McQueen* was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the Defendant, subject to a power of revocation by the *McQueens* on onerous terms, which was not exercised. But this state of things created no legal privity between the Plaintiffs and the Defendant, from which a promise can be implied on the part of the Defendant to pay the present Plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shewn, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now Plaintiffs were fully aware, during the pendency of the former suit, of the arrangement

between the *McQueens* and the Defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-Plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in *England*, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward* v. *Gifford* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in *Calcutta* was much relied on by the Appellants' counsel: *Bamasoondaree Dossee* v. *Anundolal Bose* (3). There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal Plaintiff, Mr. Justice *Phear*, on a motion, made apparently in the suit, ordered the real Plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir *Barnes Peacock*) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice *Phear's* judgment rests, but on the circumstances of the case, which shewed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the Plaintiffs that if the costs in *India*

(1) Law Rep. 6 Ch. 497. (2) 4 M. & W. 194.
(3) Bourke's Rep. O. C. J. 45; and on appeal, p. 96.

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were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the Defendant, pending that appeal, of all the rights of the *McQueens* in the property and the suit. Undoubtedly the *McQueens* after this purchase became nominal Appellants only, and the claim of the Plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the Mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions.

The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the Plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the Defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

Solicitor for the Appellants: *J. H. Wrentmore.*
Solicitors for the Respondent: *Clarke, Rawlins, & Clarke.*

J. C.* 1876 Nov. 28, 29, 30.

KONWUR DOORGANATH ROY . . . . PLAINTIFF;

AND

RAM CHUNDER SEN AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Dewuttur Property—Alienation—Bonâ fide Purchaser.

In a suit to set aside certain alienations of an ancestral mehal on the ground that the mehal had been dedicated to the worship of an idol, the defence was (1) that the estate had not been so dedicated; (2) that if it were, there was legal necessity for the alienation.

The deeds of transfer contained recitals that the estate transferred was dewuttur, that the temple was out of repair, and that the purchase-money was wanted to restore it:—

Held (1) on the evidence that the estate was not dewuttur; (2), that the admissions in the deeds must be taken as a whole, and according to them the sales were justifiable, even if the property were dewuttur; (3) that even if part only of the purchase-money was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ fide* believed by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose.

APPEAL from two decrees of the High Court (April 21, 1874), reversing a decree in the Appellant's favour of the officiating Subordinate Judge of zillah *Moorshedabad* (January 6, 1873).

The suit was instituted (10th of March, 1871) by the Appellant to recover khas possession by virtue of shebaiti right of a mehal called *Gopejan*, less 120 beegahs mentioned in the plaint (which mehal the Appellant contended was an ancestral, valid, rent-free dewuttur mehal, dedicated to the services of the idol *Radha Mohun Thakoor*), by setting aside certain alienations in favour of the Respondents, or the persons through whom they claimed, made by the Appellant's grandmother *Rani Rashmoni*, under the powers which the Respondents alleged were conferred upon her by the deed of permission executed by her husband, *Roy Bijoy Krishna*, hereinafter sufficiently set out in the judgment of their Lordships.

The main points upon which the Courts differed in opinion

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

were, whether the property in question was, and was proved in the suit to be, dewuttur? and, whether there was any legal necessity for its alienation? The Officiating Judge held that it was dewuttur, and that there was no such necessity. The Judges of the High Court were of opinion that this Appellant had failed to prove that the property was dewuttur, and that, as secular property, a sufficient necessity for its alienation was shewn, and consequently they dismissed the Appellant's suit.

The facts of the case, and the proceedings in the suit are sufficiently stated in the judgments of their Lordships.

By a mokurruri pottah executed in April, 1848, *Rani Rashmoni*, the grandmother of the Appellant, leased to *Nemai Soondur Roy*, and *Ram Soondur Sen*, two-thirds of the mehal, describing the same as "appertaining to the patrimonial dewuttur rent-free land of her late husband," and as "the dewuttur property of the *Sri Sri Iswar Radhamohun Thakoor* of *Rani Nuggar*, which is in my possession and enjoyment as shebait of the idol," and reserving a rental of Rs.325 a month. The pottah contained the following recital:—"Now the temple of the *Sri Sri Iswar* being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a mourussi-mokurruri-talook of the entire lakhiraj zemindary rights in the said mouzah at a fixed jumma of Rs.325, for a consideration of Rs.1900, which I have received in cash and in full weight."

By another deed executed in March, 1849, *Rani Rashmoni* sold and assigned to *Soodha Krishna Sen*, for Rs.1700, the reversionary interest in the said property, save as to the right to a rental of Rs.25. It contained this recital: "I, agreeably to the instruction of my late husband, have commenced building the temples of *Sri Sri Iswar Radhamohun Thakoor Ico*, and others, but being in want of funds am unable to carry out the instructions of my husband."

Leith, Q.C., and *Williamson*, for the Appellant, contended that on the evidence it must be held that the mehal in question was an ancestral valid rent-free dewuttur property. The *onus* of proving that the property was not dewuttur was, under the circumstances of the case, and the recitals in the deeds, thrown upon the

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Respondents, who have failed to discharge such *onus*. It was an admitted fact that the money raised by *Rani Rashmoni* had been acquired and raised for purposes not connected with the idols, and the evidence shewed that the Respondents, or the persons through whom they claimed, had at the time the money was paid notice of the purpose for which it was required and raised. They referred to *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (1); *Brojo Soondery Debya* v. *Ranee Luchmi Konwari* (2); *Juggutmohinee Dossee* v. *Mussumat Sokheemony Dossee* (3).

Cowie, Q.C., and *Graham*, for the Respondents, argued that the definite point in the case was, whether or not the property was dewuttur. They referred to a passage in the judgment of the Lower Court: "The word 'dewuttur' has a distinct connotation. Once a property is constituted dewuttur its character is entirely changed. The tie which connected it with the proprietors is at once severed, and it becomes the property of him to whose services it is dedicated. The donor himself may or may not revoke the gift, but so long as the idol to whose services it is offered exists, the legal representatives of the donor cannot change the character of the property. It is only with the non-existence of the idol that the property can collapse." There was no evidence of dedication, constituting the property as the property of an idol. The word "dewuttur" is used in two senses: (*a*) where the property is solemnly devoted to an idol, entered as such in the Collector's books, with sebaits appointed; (*b*) in the sense of being lakhiraj, in which case it passes every day in putnee and pottah and by mortgage. As regards the former, the sebait could not transfer it to the injury of the trust, and the validity of an alienation must always turn on the existence of legal necessity for it. As regards the latter, it is a mere technical distinction with regard to the tenure, and implies that the land does not pay revenue to the Government, because at the settlement it was excluded. [SIR JAMES W. COLVILE:—All the evidence goes to shew that the land was dewuttur in the second sense. The High Court was wrong in saying it was not dewuttur at all.] Quite so. The

(1) 13 Moore, Ind. Ap. Ca. 270. (2) 20 Suth. W. R. 95; 15 Beng. L. R. 176, n.
(3) 14 Moore's Ind. Ap. Ca. 289.

anumati-patri contains no dedication in the proper sense of the term, it does not apply the revenue to a particular worship, it does not appoint a sebait.

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Leith, Q.C., replied, citing *Prossuno Kumari Debya* v. *Golab Chand Baboo* (1); *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (2); *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh* (3).

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is a suit brought by the Appellant *Konwur Doorganath Roy* to set aside certain alienations of two-thirds of an ancestral mehal called *Gopejan*, made by his grandmother *Rani Rashmoni*, on the ground that the mehal had been dedicated to the worship of an idol *Radha Mohun Thakoor*. The Respondents are the successors of the original grantees, or persons deriving title from them. To shew the position of *Rashmoni* at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband *Roy Bijoy Krishna*, an anumati-patri has been put in, which gave her, undoubtedly, special powers. The anumati-patri, or so much of it as is material, is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral debkisti (worship of the gods), &c., and offer the jolpinda (funeral cake and libations of water) of my ancestors. For the observance of all these rites, and of the jolpinda to the ancestors, as well as the preservation of the zemindarys, lakhiraj, dewuttur, &c., I in my sound mind give you permission on my death to keep possession of my zemindarys, dewuttur, &c., recording your own name in the Collectorate Sherishta, to remain in enjoyment of the profits, and to defray the expenses of the deb kirti during your lifetime, and to adopt one or two sons born in the family of true Brahmans. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if

(1) Law Rep. 2 Ind. Ap. 145. (2) 13 Moore's Ind. Ap. Ca. 270.
(3) 10 Moore's Ind. Ap. Ca. 451.

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you should desire it, get his name recorded in the zemindary tahoot, and surrender the entire management to him," and then there is this statement: "Now I am a debtor to mahajuns (creditors). Some mehals of the zemindary are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the zemindary or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to dewuttur property in this document, but this document itself creates no endowment; and it is necessary for the Plaintiff to shew *aliunde* that there was an existing endowment in favour of this particular idol to which the word "dewuttur" may be referred.

With regard to the position of *Rashmoni* under the anumatipatri, it would seem that she took a life interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to *Rashmoni* to alienate the estate; but she had, as the manager of the estate, power, if it were dewuttur dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a mourussi mokurruri pottah, which she granted to two persons, *Nemai Soondur Roy* and *Ram Soondur Sen.* This pottah describes the estate thus; *Turruf Wargopjan*, alias *Gowaljan*, which is admitted to be the estate *Gopejan*, "the patrimonial dewuttur rent-free land of *Bijoy Krishna Roy*, my late husband, the boundaries of which are on the east the *Ganges*," and so on, "is the dewuttur property of the *Sri Sri Iswar Radhamohun Thakoor* of *Raninuggur*, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 beegahs, or one-third of that mehal, had been decreed to *Bhagiruthi Debi*, the widow of one of her husband's brothers, *Ram Krishna Roy*. "With the exception of 120 beegahs of mathan land decreed in the suit of *Bhagiruthi Debi*, widow of the late *Ram Krishna Roy*, the eldest brother of my late husband, the

remaining lakhiraj lands," and so on. The document proceeds: "Now the temple of the *Sri Sri Iswar* being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a mourussi-mokurruri-talook of the entire lakhiraj zemindary rights in the said mouzah at a fixed premium of Rs.325, for a consideration of Company's Rs.1900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by *Rashmoni* in favour of *Soondur Krishna Sen*, one of the family of one of the grantees of the mokurruri. It is a bill of sale of the proprietary right to the extent of Rs.300 of the mokurruri rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of *Bhagiruthi*, "a mourussi and mokurruri talook, representing the entire right in the lakhiraj zemindary, was given in settlement of *Nemai Soondur Roy*, inhabitant of *Naharpara*, and *Ram Soondur Sen*, inhabitant of *Koridha*, at an annual jumma of Rs.325, exclusive of collection charges, on the 18th of Cheyt of the year 1254. They hold possession of the property as a mourussi and mokurruri talook, and are paying the fixed jumma. I, agreeably to the instructions of my late husband, have commenced building the temples of *Sri Sri Iswar Radhamohun Thakoor Jeo*, and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you for Company's Rs.1700 my own entire share of 14 annas, 15 gundahs, 1 cowri, 2 kags out of 16 annas of the said mourussi mokurruri mouzah, the jumma of which is Rs.300."

Mr. *Leith*, on the part of the Appellant, undertook to satisfy their Lordships that this mehal of *Gopejan* had been dedicated to the idol, and therefore it was incompetent for *Rashmoni* to make these alienations.

Now, apart from the admissions contained in the mourussi pottah and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to shew that this land was so dedicated.

Mr. *Leith* opened his case by an endeavour to shew a deed of foundation or endowment of the idol by the gift of this estate from

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Rajah *Mahanund*, who was the father of Rajah *Bijoy Krishna*, the husband of *Rani Rashmoni*.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah *Mahanund*, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son *Bijoy*, who left a widow, *Rashmoni*, giving her the anumati-patri, to which reference has already been made. She, it appeared, lived until February, 1870. She exercised the power of adoption given to her by her husband, and adopted *Krishna Chunder*, who married *Rani Prosunnomyi Debi*. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favour of the Appellant, *Konwur Doorganath Roy*. It appears that Rajah *Bijoy* had two brothers, and one of them married a lady of the name of *Bhaguruthi Debi*, who in the year 1855 brought a suit against *Rashmoni*, and obtained the decree already mentioned, to recover one-third of the mehal of *Gopejan*.

If the deed of endowment from Rajah *Mahanund* were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the Rajah *Mahanund*, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubicari of a former suit, is relied upon as shewing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of *Gopejan* was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a rubicari of a proceeding in a former suit brought by a creditor against *Rashmoni* in the year 1840. It appears that in that suit certain property was attached, and that *Rashmoni*, in order to get rid of the attachment, set up

that the property so attached was dewuttur property dedicated to the idol *Radha Mohun Thakoor*. It appears from the rubicari that this deed was put forward by a man called *Bhuttacharjya*, who was the tasildar of *Rani Rashmoni*. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though *Bhuttacharjya* was called as a witness in the suit brought by *Prosunnomoyi* on behalf of the present Appellant to set aside these deeds during the lifetime of *Rashmoni*, and which was dismissed, because it was considered to be incompetent to institute it during the lifetime of *Rashmoni*, he was not asked any question about this deed.

The state of the case then is this: No evidence has been given of the existence of such a deed, except the mention of it in the rubicari; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called in *Prosunnomoyi's* suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the sherista of the zemindary—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by *Bhuttacharjya* on behalf of *Rashmoni* in the creditor's suit is proved by the rubicari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the rubicari, their Lordships find that the question what property was included in it is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The rubicari states, "It appears from a perusal of the whole of the papers of the record, that for the payment of the money due to the Plaintiff, the brick-

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built house and garden, &c., belonging to the Defendant, were under attachment. After issue of notice of auction sale, the objector above-mentioned filed a petition, stating, among other matters, that the properties which were assigned by Rajah *Mahanund Roy*, father-in-law of the Defendant, for the worship of the idol *Radha Mohun Thakoor*, &c., established by the Rajah, cannot be sold or transferred by his heirs. It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The rubicari states, "Accordingly the objector filed the shevaitnama of the 5th of Aughran, 1202, under seal and signature of Rajah *Mahanund*, accompanied by an isumnuvisi containing the names of four witnesses." Then, "The objector has also filed a copy of the nikas paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the deb-sheva, as aforesaid, are part and parcel of the lakhiraj mouzah *Gowaljan*." That appears to be this mouzah *Gopejan*. This is the only phrase which can be relied upon as shewing that the entire mehal was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brick-built house, garden, &c., which had been devoted to the idol, were part and parcel of the lakhiraj mouzah *Gowaljan*. It is quite consistent with that statement that these parcels had been taken out of that lakhiraj mouzah and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and mookhtear and one or two other witnesses that the rents of this mehal *Gopejan* were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The mookhtear says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to

sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of, to the worship of the idol *Radha Mohun*, that fact is by no means sufficient to establish the *onus* which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts shewing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to shew that an endowment was made, other than that rubicari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the Plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by *Bhagiruthi*, the widow of the eldest brother of *Bijoy*, that the family understood that there was no such endowment. That suit was brought by *Bhagiruthi* to recover from *Rashmoni* one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the brothers, was entitled. That is her claim. *Rashmoni* does not set up as a defence that the mehal was dewuttur property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it—she sets up no case of that sort—but allows a decree to be passed against her in favour of *Bhagiruthi* to recover one-third of the mehal, and in that decree the property is described, not as dewuttur, but as bromuttur property.

Now if this mehal had been really dedicated to the idol, it

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would no longer have been a partible estate. *Rashmoni* would, as shebait, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that *Bhagiruthi* could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the Plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not dewuttur property such as it is alleged to be on the part of the Plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the mourussi pottah and of the bill of sale. Mr. *Leith*, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being dewuttur. But the statements in these deeds are relied upon by the Plaintiff as an admission which estops the parties to them from asserting that these lands were not dewuttur. But if the statements are relied on in this way, they must be taken as a whole; and so taking them it would appear that, granting the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurruri was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the mokurruri rent was granted in consideration of money stated to be required for the completion of the temple which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been dewuttur land.

What, then, is the Plaintiff's position? These deeds are thirty years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shewn that the representation, although made, was not believed by the

grantees, and that they colluded with *Rashmoni* to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to shew that the original grantees did not believe the statements appearing upon the face of the deeds; indeed if they had made inquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if *Rashmoni* offered this mokurruri pottah to raise money for the purpose of doing the repairs that the temple required, the purchaser who *bonâ fide* took it upon that representation would clearly be entitled to keep his purchase. It may be that *Rashmoni* did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in *Hunoomanpersad Panday* v. *Mussamut Baboee Munraj Koonwaree* (1). "The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on

(1) 6 Moore, Ind. Ap. Ca. 423.

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a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted *malâ fide*, will not be affected though it be shewn that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that under such circumstances he is bound to see to the application of the money." That passage was adopted in a very late case before this Board: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1). In that case a shebait had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a mokurruri pottah was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bonâ fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the Plaintiff that this answer had not been put forward by the Defendants, and undoubtedly they have relied more strongly upon the defence that the land was not dewuttur land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for

(1) Law Rep. 2 Ind. Ap. 151.

two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the Respondents; and it is to be observed that in the suit brought by *Prosonnomoyi* during the lifetime of *Rashmoni*, in which the original grantee, *Sen*, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the Plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The Plaintiff in that case should have offered to reimburse the *bonâ fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the Appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondents: *Rogers & Judge.*

J. C.* 1876 Nov. 24, 25, 28

ABEDOONISSA KHATOON . . . . . DEFENDANT;

AND

AMEEROONISSA KHATOON . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Execution Proceedings—Jurisdiction—Sect. 208 *of Act VIII. of* 1859—*Sect.* 11 *of Act XXIII. of* 1861.

The widow of a decree-holder, having been substituted on the record under sect. 103 of Act VIII. of 1859 for the purpose of prosecuting an appeal, applied for execution on behalf of herself and as guardian of her infant son, whose legitimacy as a son of the deceased decree-holder was disputed and eventually decided in such execution proceeding, and obtained a declaration that she was entitled to execute the whole of her decree against the judgment-debtor.

In a suit by the widow of the judgment-debtor to set aside this judgment, *held*, that the above issue of legitimacy had not been decided by a competent Court in a competent proceeding.

Neither sect. 208 of Act VIII. of 1859, nor sect. 11 of Act XXIII. of 1861 authorized the Court to try the above issue of legitimacy in an execution proceeding, the infant son not having been a party to the suit in which the judgment was passed.

APPEAL from a decree of the *Bengal* High Court (July 26, 1873), affirming a decree of the subordinate Judge of *Dacca* (Sept. 29, 1871).

This litigation was a sequel to, and arose out of, a previous suit in which these parties were interested, and which was finally disposed of by a judgment of the Privy Council (Jan. 30, 1875), reported in Law Rep. 2 Ind. App. 87.

The facts necessary to the understanding of the question decided in this appeal are stated in their Lordships' judgment printed hereafter.

The proceedings out of which this appeal arose are as follows:—

Wahed Ali, the Plaintiff in the first suit, died on the 26th of February, 1863, pending his appeal to the High Court therein. He left his widow (the Appellant *Abedoonissa*), a daughter named

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Allee Bukhee, who died the 31st of August, 1863. *Abedoonissa* stated, and the above-named Respondent denied, that she was left pregnant of *Wajed Ali*, who was born on the 20th of November, 1863. A contest arose as to the right to a certificate to the estate of the daughter between this Appellant, as her mother, and *Abdool Ali*, the father of the deceased *Wahed Ali*, which was finally granted to the Appellant in February, 1864. She then applied to the Judge of *Dacca*, as holder of a certificate of administration to her husband's estate, and as mother of *Wajed Ali*, to obtain execution of the decree passed by the High Court in favour of her husband, *Wahed Ali*, against his father *Abdool*. The Judge refused to issue execution without an order from the High Court. On the 10th of February, 1868, the High Court directed execution to issue, and that the Judge should try two issues, one being as to the fact of *Wajed Ali* being *Wahed Ali's* son. Eventually that issue was tried in the execution proceedings, and it was held by the Judge that *Wajed Ali* was not the son of *Wahed Ali*. On the 8th of March, 1870, the High Court reversed that decision.

Such order having been made in a summary proceeding, the Respondent filed a plaint on the 9th of September, 1870, against the Appellant as an individual, and also as guardian of her alleged son, to have it declared that *Wajed Ali* was not *Wahed Ali's* son, and to stay execution in the old suit. By her plaint she recited the judgments in the former suit and the fact of the appeal to Her Majesty as still pending; and she alleged that *Abdool Ali* was entitled, as heir to his son *Wahed* and his granddaughter *Allee Bukhee*, to 11$\frac{1}{3}$rd annas of the estate left by them, and that as he, *Abdool Ali*, had executed to the Plaintiff a jouleutnamah and various other deeds of sale during the years 1265, 1269, and 1270, she was entitled under those instruments to the interest which her husband had as such heir in the properties mentioned in the three first schedules to her plaint, and as his widow to one-eighth of the properties mentioned in the 4th and 5th schedules, and she sought to impeach the legitimacy of *Wajed Ali*.

The Appellant by her written statement contended *inter alia* that the former adjudication was final, and that the Respondent should not be allowed to bring this suit while prosecuting her appeal to Her Majesty in Council. And she asserted, as a fact,

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the legitimacy of *Wajed Ali*, and the total falseness of the Respondent's alleged grant.

On the 29th of September, 1871, the subordinate Judge delivered his judgment, and ordered as follows:—"That this suit so far as it seeks to declare that *Wajed Ali* is not the son of the womb of the principal Defendant and of the loins of the husband, be decreed; that the claim for confirmation of right in zemindarys, &c., be dismissed; that Plaintiff do receive from Defendant costs in proportion to the value of 2 annas of the entire estate, with interest at 10 annas, and do pay to the Defendant costs of the excess claim, with interest at the same rate."

The now Appellant then appealed to the High Court, stating forty-nine grounds of appeal.

On the 26th of July, 1873, the Chief Justice *Couch* and Mr. Justice *Glover* delivered judgment dismissing the appeal with costs.

Doyne, for the Appellant, contended that the Respondent had no interest dependent on the legitimacy, or otherwise, of *Wajed Ali*, which gave her a *locus standi* to maintain this suit. The suit contemplated the affirmance by Her Majesty in Council of the decree of the High Court in the former suit, and should not have been allowed to be proceeded with while that appeal was pending. It was, in its nature, purely declaratory, and on the evidence the Respondent had failed to prove the illegitimacy of *Wajed Ali*. The decision of the High Court of the 8th of March, 1870, in favour of that legitimacy, should have been held final and conclusive in a suit based, as is the present, on the decree of the High Court then in course of execution. See *Soorjomonee Dayee* v. *Suddanund Mahapatter* (1). The Judge had jurisdiction to pass that decision in the execution proceedings. [He referred to Act VIII. of 1859, sects. 73, 99, 102, 208, 210, 332 (repealed by Act XXIII. of 1861, 363, 364. [*Leith*, Q.C., referred to sect. 283]. A discretion is given to the Court to decide such an issue as this in such proceedings. It is not at all necessary that the issue raised in the execution department should relate to matters in issue in the suit: See *Chowdry Wahed Ali* v. *Mussamut Jamaee* (2); *Aga Syed Abdool*

(1) 12 Beng. L. R. 304. (2) 11 Beng. L. R. 149.

Hoosein v. *Lenaine and Snaddon* (1). Another decision upon sect. 11 of Act XXIII. of 1861 (though by a clerical error sect. 2 is printed throughout the report) is *Rughunundun Rain* v. *Sumessar Panday* (2); *Hurrolall Doss* v. *Soojawut Ali* (3).

Leith, Q.C., and *C. W. Arathoon*, for the Respondent were not called upon.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated:

Wahed Ali brought a suit against his father *Abdool Ali* to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain hibbanamahs in favour of his son when that son was an infant. It was alleged on the part of the father that the son had subsequently executed certain ikrarnamahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of first instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that *Wahed* appealed to the High Court. Pending the appeal *Wahed* died: and thereupon the High Court, as it appears to their Lordships, under the powers given them by sect. 103 of Act VIII. of 1859, substituted his widow *Abedoonissa* for *Wahed* for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the ikrarnamas to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of *Wahed* "disputes have arisen, and litigation is now pending concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted his widow *Mussumat Abedoonissa Khatoon* to be his legal representative." At the conclusion of the judgment they thus

(1) 13 Moore's Ind Ap. Ca. 69. (2) 13 Beng. L. R. 489.
(3) 8 Suth. W. R. 197.

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express themselves: "The decree of the Court below is reversed, with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi *Wahed Ali* was, in his lifetime, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of *Wahed* are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several ikrarnamas and miras pottahs, dated respectively the 29th Falgoon, 1259, 16th Aughrau, 1263, 6th Jeyt, 1264, and the 15th Aughrau, 1263, were of no effect, and void against Moulvi *Wahed Ali* in his lifetime, and are void against his lawful representatives. And it is further ordered and decreed that the Defendants, Respondents, who appeared in this appeal, do pay to the Plaintiffs, Appellants, the sum of Rs.3000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are, by no means satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty in Council, and in 1875, the judgment was reversed. In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow *Abedoonissa* applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, *Wajed Ali*, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this

child was disputed by *Abdool Ali*. Certain other parties also applied for execution, Messrs. *Wise* and *Dunne;* but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of *Dacca*, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of *Wajed Ali*, the son whom the widow had put forward as being legitimately born to *Wahed*. Unfortunately, we have not the original judgment of the Judge of *Dacca* before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under sections 102 and 103, and section 208 of Act VIII. of 1859, the case may, so far as anything has been shewn to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of *Dacca*, and directed him to determine the question of the legitimacy of *Wajed Ali*. After a second remand this question was heard and decided by the Judge of *Dacca* and decided against the widow, the Judge holding that *Wajed Ali* was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of *Dacca*, and held that *Wajed Ali* was the legitimate son of *Wahed*. They refer to the proceedings in this manner: They state: "The question that is now before us is, whether the person who goes by the name of *Wajed Ali* is or is not a posthumous son of the said *Wahed Ali;* and whether, therefore, one *Abedoonissa* who is admittedly the guardian of *Wajed Ali*, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said *Wajed Ali*,"—and they decree,—"that *Abedoonissa* be declared entitled to execute the whole of her decree against the judgment debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of *Wajed Ali*. It appears to their Lordships,

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that she, in her character of guardian of *Wajed Ali*, became a new party in these proceedings, just to the same extent that *Wajed Ali* would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, *Abdool Ali* having died, his widow *Ameeroonissa* instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of *Wajed;* and secondly, upon the merits. On the other hand, *Abedoonissa* contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that *Wajed* was not the son of *Wahed;* and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court has jurisdiction in such a proceeding to try it.

Some attempt was made to establish that *Abdool* had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of *Dacca;* but the Judge of *Dacca* decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII. of 1859, and the second Act. XXIII. of 1861. The sections of the first Act relied upon by the Court in their first remand are sections

102, 103, and 208. The first sections, 102 and 103, relate to the substitution, in the case of the death of a sole Plaintiff or surviving Plaintiff, of a legal representative of such Plaintiff. The 102nd section refers to cases where there is no dispute. Sect. 103 is the section which, as before observed, was acted upon in this case, when *Abedoonissa* was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased Plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that *Abedoonissa* was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of *Wajed*, because this section, which comes under the heading of "Proceeding before Judgment" has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that *Wajed* had any interest whatever in it. Then we come to sect. 208, which undoubtedly is a section relating to proceedings for execution and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder. It appears to their Lordships, in the first place, that, assuming *Wajed* to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred, on which the law could operate, to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she

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had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed: that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that under sect. 364 of this Act no appeal would lie from any judgment or decision given in a proceeding under sect. 208; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, sect. 208 does not apply. Even if it did apply, it would appear to their Lordships that inasmuch as proceedings under it are not subject to appeal probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII. then being disposed of, we next come to the second Act, Act XXIII. of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the Appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an

appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "Any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words of this section beyond any legitimate construction which could be put upon them to apply them to the present case. In their judgment *Wajed Ali* appearing by his mother (and as before observed it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear), was in no proper sense of the word a party to this suit. No rights of *Wajed Ali* were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are therefore of opinion that this section does not apply.

Under these circumstances their Lordships have come to the conclusion that the issue that had been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Lawford & Waterhouse.*
Solicitor for the Respondent: *T. L. Wilson.*

J. C.* 1876 Nov. 30; Dec. 1.

RAJAH VURMAH VALIA . . . . . PLAINTIFF;

AND

RAVI VURMAH MUTHA AND OTHERS . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Right of Management of a Pagoda—Alienation—Custom.

An assignment from the persons known as the urallers of the *Tracharamana* pagoda and its subordinate chetroms to the Appellant of the uraima right, or right of management thereof, was *held* to be beyond the legal competence of the urallers, both under the common law of *India* and the usage of the foundation.

The assignment being of a trusteeship for the pecuniary advantage of the trustee, could not be validated by any proof of custom.

APPEAL from a decree of the High Court of *Madras* (Feb. 20, 1873), dismissing with costs an appeal from a decree of the Civil Judge of *Tellicherry* (Sept. 30, 1870), whereby the Appellant's suit was dismissed with costs.

The Appellant was the Rajah of *Cherakel Kovilagom*, who claimed under the assignment referred to in the judgment of their Lordships. The Respondents were three in number: the first and second representing the family of the Rajah of *Kottayam*, the third being an office-holder in the *Tracharamana* pagoda. The questions in dispute were, whether the urallers, or managers, of the *Tracharamana* pagoda, could lawfully alienate to the Appellant their right to manage the said pagoda? and if so, whether the alienation which they admittedly made in his favour conferred any and what rights against the Respondents?

Exhibit E, the assignment in question, was dated the 10th of May, 1868, and was executed by the four urallers to the Appellant. It recited that the pagoda and its dependent institutions belonged exclusively to the four tarwads (families) of the urallers; that they were in debt to the amount of Rs.46,000; that as the property was insufficient to conduct the affairs of the pagoda, this debt was likely to increase; that the *Cherakel* Rajah was willing to pay off the debts, and take over the pagoda and its property

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

and conduct all the ceremonies, and that the urallers had received in cash Rs.46,000 to pay the debts, and Rs.10,000 for their own use. In consideration of the above the deed assigned over to the rajah all the property, movable and immovable, of the pagoda, and the uraima right of the four families, with the reservation of their right to join in the assembly for conducting the ceremonies, and receive the perquisites attached thereto. This document was admittedly signed by the four urallers and the members of their families, and was registered.

The facts and proceedings are sufficiently set forth in the judgment of their Lordships.

Mayne, for the Appellant, contended, that according to the law and custom of *Malabar*, an uraima right is alienable, and that the Appellant was at least entitled to be declared the lawful assignee of all the rights of the four urallers, and the custodian and manager of the property of the pagoda to the same extent as such custody and management were vested in them. The alienation of religious trusts is not unknown to Hindu law. Where an office which involves the performance of religious duties devolves upon a female, Hindu law allows it to be taken by her, while the duties are to be discharged by deputy. [SIR MONTAGUE E. SMITH :—Appointing a deputy means that the office and the rights are preserved, but the particular acts are performed by a deputy.] A right of management can be transferred in case the performance of duties is provided for: see the futwah of the pundits given in *Kounla Kant Ghosal* v. *Ram Huree Nund Gramee* (1). It never occurred to the pundits in that case that a right of management could not be transferred provided it were transferred as a managership and not as private property: see also *Mohunt Gopal Dass* v. *Mohunt Kirparam Dass* (2). [SIR BARNES PEACOCK :—In both these cases it was a gift, not a sale, which took place.] In *Ukanda Varriyar* v. *Ramen Nambudiri* (3) there was a sale of an uraima right: see also *Ragunada Naik* v. *Chinnapa Chettry* (4). Greater weight should have been allowed to

(1) 4 Select Rep. (Beng.) Old Ed. p. 196; New Ed. 247.
(2) Beng. S. D. A. 1850, p. 250.
(3) 1 Mad. H. C. Rep. 262.
(4) 4 Mad. Revenue Register, 109, per *Innes* and *Collett*, JJ.

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the evidence given of custom. There is no country in the world in which custom has such extraordinary force as in *India*. All the sages before the Commentators regard custom as entitled to overrule positive precept. These texts are collected in the case of *Bhai Nanaji* v. *Sundrabai* (1).

The Respondents did not appear.

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal by the person who has been throughout the argument called the *Cherakel* Rajah against a decree of the Civil Court of *Tellicherry* and a decree of the High Court of *Madras*, both dismissing his suit. The Rajah claims to be the assignee of the uraima right, or right of management, of the *Tracharamana* pagoda and its subordinate chetroms, under an assignment from the persons known as the urallers of that religious foundation. The early history of the foundation seems to be lost; no trustworthy account of its origin is to be found in the evidence taken on the remand by the High Court. The nature of the existing institution, however, is shown pretty clearly upon the proceedings. It appears that the so-called pagoda is not a pagoda in the ordinary sense of the word, but a mere platform in the middle of the forest, upon which, once in every year, certain ceremonies take place in honour of a particular idol; that to this annual festival a large number of persons resort; that considerable presents and offerings are made there by the worshippers; and that the festival is a matter of general interest to the Hindu inhabitants of that part of the country. It also appears that the property of the trust consists partly of a large landed estate, and partly of jewels of considerable value, which were kept in a place called *Karimpana Goprum*. The Rajah having obtained from the urallers the assignment contained in Exhibit E, succeeded in getting into possession of the whole or greater portion of the landed property; but his right to the custody of the jewels was disputed by the Defendants to this suit and others; who actively resisted his

(1) 11 Bomb. H. C. R. 249, 252, 264.

attempt to remove them from their ordinary place of custody. There being a real or supposed risk of a breach of the peace, the usual reference to the magistrate took place. Whilst that was pending, the Rajah asserted that the goprum had been broken open and some of the jewels abstracted. However that may be, it is certain that the persons accused of having robbed the goprum were acquitted of any criminal offence; that the jewels which they were said to have stolen were placed in the hands of the magistrate, who passed an order forbidding the Rajah to remove the property, or any portion of it, from its usual place of security in the goprum until he had the authority of the Civil Court for so doing; and directing that the keys of the room which contained the jewels should remain in the hands of the person who is the third Defendant on this record. Upon this the *Cherakel* Rajah brought the present suit.

It seems to their Lordships that there was some little confusion and misconception in the Indian Courts as to the nature of the suit. The Civil Judge speaks of it as a suit for specific performance. Again, Mr. Justice *Holloway*, in the second ground of his judgment on the appeal, seems to draw a distinction between the jewels and the other property belonging to the institution, and to express an opinion that in order to dispose of the Plaintiff's claim, it was sufficient to say that the jewels having been devoted to the service of an idol, were *extra commercium*, and could not pass under the assignment. The suit is clearly not one for specific performance. It is not brought against the other parties to the contract, the urallers, but against persons, strangers to the contract, who are disputing the right of the Plaintiff under his assignment to take possession of a portion of the property belonging to the pagoda.

Again, if it be conceded that the assignment has legally transferred all the rights of the urallers to the Rajah, and that the urallers had an unqualified right to the custody of these jewels, and the power of removing them to any place they pleased, and of keeping them there, it would hardly be an answer to the suit to say that the jewels, being devoted to an idol, were *extra commercium*. The suit seems to their Lordships to be in the nature of an action for detinue, brought to recover jewels, the right to the

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custody of which the Rajah says has passed to him by virtue of the assignment, wherein the Plaintiff has to make out his title to the goods, which by an apt plea has been put in issue.

The parties having put in their written statements, certain issues were settled in the cause.

Of these their Lordships have only to deal with the first and second. The first is, was the deed of assignment valid? the second, has the Plaintiff thereby acquired all the rights of the urallers?

It is to be observed, however, that this second issue covers something more than the broad and general question whether the urallers were legally competent to transfer the property of this pagoda to an individual upon the trusts upon which they themselves held it. If this question be decided as the Courts in *India* have decided it, there is of course an end of the Plaintiff's case. But if it were decided in his favour, a further question would arise, viz., whether according to the constitution of this particular institution, the concurrence of the *Kottayam* Rajah, or that of some of the ministerial officers of the institution, and in particular of the third Defendant, was not necessary in order to validate the assignment. Upon these and other questions relating to the rights and powers of the Defendants, which are more distinctly raised by the subsequent issues, Mr. *Mayne* has not as yet addressed their Lordships, and the conclusion to which their Lordships have come renders it unnecessary to discuss them. They propose therefore to consider only the broad and general question decided by the Indian Courts, viz., whether the urallers were legally competent to transfer their uraima right by the Exhibit E.

It is admitted that according to the constitution of the institution the urallers for the time being were to be the karnavens or chief members of four different tarwads. It was, therefore, presumably the intention of the founder that the uraima right should be exercised by four persons representing four distinct families.

The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of

it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this *Cherakel* Rajah is, and therefore the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. *Mayne* almost admitted that the broad principle *delegatus non potest delegare* would *primâ facie* apply to such a case. He argued, however, that the decisions of the Court of Chancery, of which some have been cited in the judgment of the Civil Judge, are of no authority upon a question arising between Hindus touching a Hindu religious foundation; and he relied on various cases decided in *India*, as favouring, if they do not directly affirm, the propositions, which the Appellant has to establish. In their Lordships' opinion, the authorities cited by him do little or nothing to advance the Appellant's case. In the first the decision was against the particular transfer in question. The authority relied upon was a mere expression of opinion on the part of certain pundits, founded on the text of the *Dàyabhaga* (a treatise not necessarily of authority, except in *Bengal*), that a certain deed of gift executed by the owner of lands in *Bengal* would carry dewuttur lands with the obligation of keeping up the worship of the idol. The next case, which was cited from the *Bengal* S. D. A. reports for 1850, really has no application to the present; or, if it has any, is inconsistent

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with the Appellant's contention. The Court then said: "But a further objection arises as to the Plaintiff's claim, viz., that were the deed established, and were it shewn that it was the intention of the donor to transfer to the donee his rights of office as well as personal rights, and also the duties incumbent on the office of mohunt, there has been no public acknowledgment of the Plaintiff by the assembly of mohunts and others in due form, as is proved on the record to be customary on the death of one mohunt and the appointment of his successor." In that case, therefore, evidence of what the constitution of the foundation was had been given; the transfer which was insisted upon was shewn to be inconsistent with that constitution, and was treated as invalid.

Again, the preponderance of the authorities in *Madras* appears to be against the present contention. The first case, cited from the first volume of *Madras* High Court Reports, decided that the assignment in question was not valid, because all the urallers had not joined in it.

It cannot be inferred from such a ruling, that there was any implied decision, or even, as Mr. *Mayne* would put it, a dictum, in favour of the proposition that an assignment executed by all the urallers of any foundation of this kind would operate as an effectual transfer of their trust. The Court merely decided on one patent defect of title, without considering whether, if that defect had not existed, the title could have been supported.

The next case was that before Messrs. *Innes* and *Collette*. That is to some extent in favour of Mr. *Mayne's* view, though it related to a charitable and not to a religious foundation, and we have not clearly before us what the facts were as to that foundation. That the broad distinction which the Civil Judge takes between a religious and a charitable foundation can be supported, their Lordships are not prepared to say. Then came the decision of Mr. Justice *Holloway* when he was a Judge of *Calicut* (1). It is said that the High Court afterwards remanded this cause for the trial of certain issues as to the alleged rights of the Plaintiff, who, it may be observed, was the same person as the Plaintiff in the present case. Some of those rights, however, were different from that now

(1) *Raja Verum Rajah of Cherakel* v. *Karimbil Ambu Mutta Nambu and others*, unreported.

asserted. The Plaintiff did not there claim, as here, only under an assignment from certain urallers. He also set up superior rights to those of the urallers, claiming a power to remove as well as a power to appoint them. It is not shewn to their Lordships' satisfaction that Mr. Justice *Holloway's* general position in that case was finally or conclusively overruled by the High Court.

This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of *Madras* which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the urallers had no power under what may be termed the common law of *India* to transfer their uraima right to the Plaintiff, the *Cherekel* Rajah.

But it is said that in *India*, and particularly in that part of *India* in which this pagoda is situated, custom must prevail against the general law. That such would be the consequence of a well-proved and established custom their Lordships do not deny. In the present case, however, the Civil Judge has distinctly found against the existence of the custom; and although the High Court has not dealt at large with the evidence given in the cause, Mr. Justice *Kindersley*, at all events, seems to have treated the alleged custom as not established. If the two Courts had clearly concurred in a finding that the custom had not been established, their Lordships would have applied their ordinary rule in such cases; but there being some slight doubt about the effect of the second judgment they have allowed Mr. *Mayne* to draw their attention to the evidence. After hearing that evidence they feel bound to say that it is wholly insufficient to induce them to overrule the finding of the Civil Judge. It appears to them that no general custom such as that contended for can be established by such very vague and loose evidence. They would further observe that they have grave doubts whether any such general custom can, in cases like the present, be set up and proved in that way. They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. This seems to have been decided in the case

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of *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1). That came before this Board, on appeal from a decision of the High Court of *Bengal*, when Sir *Barnes Peacock* was Chief Justice; and in the Chief Justice's judgment, which was afterwards affirmed by this Board, there is this passage: "Numerous cases have been cited to shew what was the usage, but the law to be laid down by this Court must be as to what is the usage of each mohuntee. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular mohuntee." And their Lordships on the appeal said, "It is to be observed that the only law as to these mohunts and their office, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to shew that any appointment has ever been made in reversion on any former occasion. That seems to their Lordships to point, though perhaps less distinctly than the passage in Chief Justice *Peacock's* judgment, to the necessity of proof of the custom of the particular mohuntee. The same principle was recently affirmed by this Board, in the case of *Rameswarem Pagoda* (2). At page 228 their Lordships observe: "But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them. That principle was laid down by this Committee in an appeal involving the succession to the office of mohunt of a richly endowed mutt in *Rajgunge*, in these terms. And the judgment then cites the passage from the 11th *Moore's* Indian Appeals which has been just read, and proceeds to consider the evidence of usage as to the particular pagoda.

Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and

(1) 11 Moore's Ind. Ap. Ca. 428. (2) Law Rep. 1 Ind. Ap. 209.

they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law.

Upon these grounds their Lordships are of opinion that no case has been made for interfering with the decrees under appeal; and they most humbly advise Her Majesty to affirm those decrees and to dismiss this appeal.

The Respondents not having appeared there will be no order as to costs.

Solicitors for the Appellant: *Keen & Rogers.*

J. C.* 1877 Feb. 6, 7, 8; March 10.

WILLIAM IRVINE . . . . . DEFENDANT;

AND

THE UNION BANK OF AUSTRALIA . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Powers of Directors to borrow and mortgage—Ratification by Company of particular act of Directors done in Excess of Authority—Such Ratification not an Extension of future Authority.

By Art. 50 of the articles of association of the *O. R. Company* (which was limited by guarantee, and registered in *Victoria* under a local Act corresponding with the English *Companies Act*, 1862), it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actual paid-up capital." The articles contained no restriction upon the company's power of borrowing; and the directors' power to borrow was capable of being extended under Art. 31, by one-half of the votes of all the shareholders given at a general meeting.

On the 23rd of December, 1867, the directors obtained a letter of credit, No. 150, for £10,000, and on the 11th of December, 1868, a letter, No. 141, for £5000, and stated to that effect in their report of the 29th of October, 1868, which was ratified at the half-yearly meeting of that date. Letter No. 150 expired on the 29th of March, 1869, but was renewed. On the 9th of September, 1869, the directors obtained another letter of credit, No. 153, for £5000, but this act was never assented to or ratified by the shareholders.

In a suit by the Respondent bank to enforce against the Appellant, as the assignee of the right, title, and interest of the *O. R. Company*, an equitable mortgage which had been granted by the company to secure advances made by the bank, which, with interest, amounted to £15,296, it appeared that half of the actually paid-up capital was never more than £8550; that at the end of 1870 the balance due to the bank was £8; and that the sums claimed in this suit had been advanced in February, 1871, viz., £10,000 under letter No. 150, and £5000 under letter No. 153:—

Held, that the limitation of the power of borrowing and mortgaging contained in Art. 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.

The ratification of the report of the 29th of October, 1868, did not autho-

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* *Present*:—LORD BLACKBURN, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

rize the directors to obtain letter of credit No. 153, in September, 1869, or to borrow £5000 thereon in February, 1871.

The ratification of letter of credit, No. 150, for £10,000, did not authorize the renewal of it, or the acting upon it after the time originally limited had expired.

Although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what is given by Art. 50, that could only be effected by a vote of one-half of all the shareholders of the company.

The ratification at a half-yearly meeting of a particular act of the directors in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.

Royal British Bank v. *Turquand* (1) distinguished.

THIS was an appeal from a decree of the Court of the Recorder of *Rangoon* (Oct. 8, 1875), declaring in effect that certain property situate at *Poozoondoung, Rangoon*, and consisting of two plots of ground with a rice mill and other buildings thereon, was charged with the sum of £14,984 16*s.* 6*d.* in favour of the *Union Bank of Australia*, and directing a sale in default of payment of that sum and interest.

The property in question lately belonged to the *Oriental Rice Company, Limited.* On the 31st of May, 1872, the Appellant *William Irvine* purchased the right, title, and interest of the *Oriental Rice Company* at a sale by auction in execution of three decrees obtained by the *Bank of Bengal* and two other creditors against the company in the Court of the Recorder of *Rangoon.*

At the date of the auction sale, the title deeds of the property were held by the *Union Bank of Australia* as equitable mortgagees by deposit.

The question raised by this appeal was, What is the sum for which the *Union Bank* is entitled to a charge upon the property? On the part of the bank it was contended that it was entitled to a charge for the whole amount owing to it by the *Oriental Rice Company.* On the part of the Appellant it was contended that the charge was limited to the amount of one-half of the actually paid-up capital of the company.

The *Oriental Rice Company, Limited,* was incorporated under

(1) 5 El. & Bl. 248; 6 El. & Bl. 327.

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the statutes in force in the colony of *Victoria*, by deed of settlement dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a company, limited by guarantee under an Act of the Legislature of *Victoria*, known as the *Companies Statute*, 1864, which followed and adopted the provisions of the *Companies Act*, 1862.

The articles of association material to the issues raised in this appeal and the facts of the case are sufficiently set forth in the judgment of their Lordships.

On the 8th of January, 1873, the Respondent bank filed its plaint in the Court of the Recorder of *Rangoon* against the *Oriental Rice Company, Limited*, and the Appellant, praying, first, that the Defendants might be ordered to pay to the bank, within a short day, the sum of £15,296 17*s.* 6*d.*, or such other sum as the Court should find to be due; secondly, a declaration that the bank was entitled to an equitable mortgage upon the premises for securing the repayment of £15,296 17*s.* 6*d.*; thirdly, foreclosure on non-payment; fourthly, or sale; fifthly, for costs and general relief.

On the 3rd of February, 1873, the Appellant filed his written statement, relying among other things on the provisions of the articles of association, which limited the borrowing powers of the directors.

On the 10th of February, 1873, issues were settled by the Recorder of *Rangoon*, including an issue whether the bank had any lien on the land mentioned in the plaint for any, and, if any, what sum.

The *Oriental Rice Company* did not enter an appearance in the suit.

On the 8th of October, 1875, the Recorder (*C. J. Wilkinson*, Esq.) pronounced judgment, and made the following decree:—

"It is ordered and declared that the Plaintiffs have an equitable mortgage on the property mentioned in the plaint, and it is ordered that the first Defendants do pay within six months from this date to the Plaintiffs the sum of £14,984 16*s.* 6*d.*, with interest thereon at 8 per cent. per annum from 5th October, 1872, to the date of decree, 8th October, 1875, equivalent to Rs.197,755 2*a.* 0*p.*, @ 1*s.* $10\frac{9}{16}$*d.*, the current rate of exchange

at the time of the filing of the suit, and the interest thereon at 6 per cent. per annum, from the date of decree to date of realization; and in default of the said first Defendants paying to the Plaintiffs such principal and interest as aforesaid within the time aforesaid, then it is ordered that the said mortgaged premises be sold. And it is further ordered that the costs of all parties as taxed by the Court be first paid out of the proceeds of the property, and that the balance be then applied towards payment of what shall be found due to the Plaintiffs for principal and interest thereon as aforesaid."

The Recorder determined that the directors of the company had no power to mortgage the company's property for an amount exceeding one-half of the capital actually paid up, but he considered that the directors intended to create a security without regard to the restrictions imposed by clause 50 of the company's deed of settlement, and he was of opinion that the shareholders had ratified the action of the directors in that respect.

Cowie, Q.C., and *E. Macnaghten*, for the Appellant, submitted that there was no evidence of ratification on the part of the shareholders of a charge or lien in favour of the bank on the company's property in excess of the borrowing powers of the directors. The directors were prohibited by the company's deed of settlement from mortgaging the company's property for an amount exceeding one-half of the actually paid-up capital of the company, and consequently the security created by the deposit of the title deeds of the company's property at *Rangoon* with the *Union Bank* must be taken to have been intended to be, and must be, limited accordingly. They distinguished between the pledge and the borrowing by the directors, and submitted that there was no ratification of either the one or the other by the shareholders. Moreover, any ratification, except in the manner described in the Act of 1862, could be of no avail. If it were shewn that all the shareholders individually had assented to the acts of the directors in this case, it could not avail as a ratification, for they could not by any assent, or by any act not authorized by law or by the constitution of the company, prejudice the position of future shareholders, nor that of simple contract creditors. Having regard

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to the constitution and objects of the company, it was most essential to limit at least the mortgaging powers of the directors. They referred to *Hutton* v. *Scarborough Hotel Company* (1). The position of directors is that of agents of the company, with special and limited powers. They are also trustees, and if they shew that they have expended moneys for the benefit of the company, they are entitled, as between the company and themselves, to be repaid. They referred to *The Electric Telegraph Company of Ireland, Troup's Case* (2); and *Hoare's Case* (3); *Lindley* on Partnership [last Ed.], pp. 780, 782; *Re Pooley Hall Colliery Company* (4). They submitted that the decree appealed from was erroneous, and ought to be varied by declaring that the charge or lien in favour of the *Union Bank* is valid only to the amount of one-half of the actually paid-up capital of the company.

Benjamin, Q.C., and *Murray*, for the Respondent, contended that the decree of the Court below was right; that the bank had a valid equitable mortgage on the property for the full amount found to be due in respect thereof. The limitation in Art. 50 on the power of the directors, whether of borrowing or of mortgaging, was not a limitation of the powers of the company or of the whole body of the shareholders. It did not affect the constitution of the company; it simply restricted the agency of the directors. Consequently any act of the directors, whether of borrowing or of mortgaging, in excess of their powers could be ratified by the company; and such ratification was effected in accordance with the rules of the company, so as to render the acts of the directors binding upon the company. Moreover the excess of authority was a matter between the shareholders and the directors, and did not affect the Respondent. The bank had notice under Art. 50 that the directors had power to borrow or mortgage under certain conditions, and it would be unnecessary for it to inquire further. It might assume that the conditions had been duly observed, and treat their performance or breach as a matter which affected the shareholders only. They referred to *Phosphate*

(1) 2 Drew. & Sm. 521; affirmed 4 De G. J. & S. 672.
(2) 29 Beav. 353. (3) 30 Beav. 225. (4) 18 W. R. 201.

of Lime Company v. *Green* (1); *Story* on Agency [4th Ed.], pl. 250; *Royal British Bank* v. *Turquand* (2).

Macnaghten replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Recorder of *Rangoon* in a suit in which the Respondents, suing in the name of their inspector, were Plaintiffs, and the Appellant was one of the Defendants.

The suit was brought to recover the sum of £15,296 17*s.* 6*d.*, for money advanced by the bank to the *Oriental Rice Company, Limited*, and to enforce an equitable mortgage as a security for the advances.

The Plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of *Rangoon* for securing the repayment of the said sum of £15,296 17*s.* 6*d.*, and that upon non-payment of that amount the Defendant might be foreclosed from his equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum, or such other sum as the Court might find to be due to the Plaintiffs, with interest and costs.

The company were made co-Defendants in the suit, but they did not appear or defend.

The Defendant (Appellant) claimed the property under a purchase at a sale in execution of a decree against the company, by which he acquired the right, title, and interest of the company, and nothing more. That purchase was made on the 31st of May, 1872.

The principal question to be decided is what is the sum for which the *Union Bank* is entitled to a charge upon the property. On the part of the bank it was contended that they are entitled to

(1) Law Rep. 7 C. P. 43. (2) 5 E. & B. 248; 6 E. & B. 327.

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a charge for the full amount claimed, and on the part of the Defendant (Appellant), that the charge is limited to the amount of one-half of the actually paid-up capital of the company, which paid-up capital the Appellant in his written statement alleged was never more than £17,100.

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital.

Their Lordships then expressed their opinion upon the point, and stopped the learned counsel for the Respondent. They were of opinion that it should be taken at £17,100, the amount found by the learned Recorder.

The company was originally formed in the colony of *Victoria* by articles of association, dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a company limited by guarantee under an Act of the Legislature of *Victoria*, which followed and adopted the provisions of the *Companies Act*, 1862.

By that registration the company, by virtue of the section of the Colonial Act corresponding with sect. 196 of the *Companies Act* of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial *Companies Act*, in the same manner in all respects as if it had been formed under that Act.

The articles of association contained no restriction or limitation on the company's power of borrowing.

As regards the directors, however, their authority to borrow was limited; for it was expressly stipulated by Art. 50 of the articles of association, which were registered under the *Companies Act*, and of which the bank was bound to take notice, "that subject and without prejudice to the power therein given to the meetings of shareholders and the conditions and restrictions therein contained, the directors for the time being should have, amongst others, the following powers, that is to say, the power of borrowing and taking up on the credit of the said company or of its property any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said company, and that for the purpose of securing any sum or sums which might be so borrowed

by the directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber, all or any part of the property, estate, and effects, real and personal, of the said company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said company, or to overdraw the account of the said company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said company, and the affairs and concerns of the said company, both in *India* and *Victoria* and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said company, both in *India* and *Victoria* and elsewhere, according to the provisions and subject to the restrictions of the said articles of association, should be confided to and be under the direction of the said directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the directors to borrow or take up upon the credit of the company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the company. There is no doubt that the authority of the directors, limited as it was by the articles of association, was capable of being extended under the provisions of Art. 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The article is in the following words:—

"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of the provisions or powers herein contained, or to remove any director or trustee, or to increase or diminish the number of directors, but that upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the directors either to borrow or to mortgage was ever extended at a general meeting

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of the shareholders called for the purpose, but it was contended by the learned counsel for the Respondent, that the limitation of the power of borrowing and of mortgaging, contained in Art. 50, was merely a limitation of the authority of the directors conferred by the same article; that it was not part of the constitution of the company, which, if the company had been originally formed under the *Companies Act* of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the company, or of the whole body of shareholders; and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the directors in borrowing in excess of their authority were ever duly ratified by the company.

The learned Recorder considered that there was sufficient evidence to shew that the shareholders acquiesced in and approved of the acts of the directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it.

By the 21st of the articles it is provided that an ordinary half-yearly meeting shall be held during the months of October and April in each year.

By the 22nd, that an extraordinary general meeting may be called at any time for a special object.

By the 25th, that a notice shall be sent to each shareholder, stating the day and place of the meeting, and "also the business proposed to be transacted thereat."

By the 26th, that at every general half-yearly meeting the accounts and a statement of the company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the directors or auditors, so as to bind all the members for the time being of the company, and all persons claiming under them."

The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in Art. 26, but would not indicate that it was for any other purpose.

The report of the directors referred to in Art. 26 seems to their Lordships the same thing as the statement of the company's affairs previously mentioned in the same article. There is nothing in the articles requiring the directors to circulate the reports among the shareholders before the meetings. There is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the company), at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

But if the object was to give the directors in future an extended authority beyond what is given by Art. 50, their Lordships think that it would be an alteration of the provisions contained in the articles which, under clause 31, could only be made by a vote of one-half of all the shareholders of the company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future.

This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings, gave validity to acts of a similar character done subsequently.

For instance, it is important in considering whether the ratifi-

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cation at the half-yearly meeting held on the 30th of April, 1868, of the act of the directors in borrowing £13,000 when £10,000 previously borrowed remained unpaid, if made out, so far extended the powers of the directors as to authorize them to take up as an existing debt at the same time a further sum of £23,000 when the sums of £13,000 and £10,000 should have been paid off, notwithstanding the provisions of Art. 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February, 1871, £10,000 under the letter of credit No. 150, and £5000 under the letter of credit No. 153. The balance remaining due of all sums previously advanced by the bank had been reduced at the end of 1870 to £8 8*s.* 9*d.*

The last general half-yearly meeting of the company was held on the 13th of October, 1869. At that meeting the directors submitted their report for the period ending the 30th of June, 1869, and that report was adopted.

According to the evidence of Mr. *Curtayne* the letter of credit No. 153 was issued on the 9th of September, 1869. The fact of the directors having obtained that letter of credit could not and did not appear in the report of the directors for the period ending June, 1869, and the act of obtaining that letter of credit or of borrowing money thereon does not appear to have been ever reported or made known to the shareholders or ratified by them. The claim therefore as to that £5000 must be rejected unless the ratification of the act of the directors in obtaining previous letters of credit for £10,000 and £5000, Nos. 150 and 141, as stated in the report of the 29th of October, 1868, which was ratified at the half-yearly meeting held on that date, authorized the directors to obtain the letter of credit No. 153 after the letter of credit No. 141

of the 11th of September, 1868, for £5000 referred to in that report, had been paid off.

Their Lordships are of opinion that the ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain the letter of credit No. 153, or to borrow the £5000 now claimed as having been advanced thereon on the 11th of February, 1871. The sum of £5000 advanced on the 17th of February, 1871, on letter of credit No. 153 must therefore be disallowed.

The only item remaining to be considered is the £10,000 advanced on the 11th of February, 1871, on the letter of credit No. 150.

That letter of credit, according to the evidence of Mr. *Curtayne*, was obtained on the 23rd of December, 1867. It authorized the *Chartered Bank of India, Australia*, and *China*, in *Rangoon*, they then being the agents there of the *Union Bank*, to honour the rice company's drafts through their manager, Mr. *Jamieson*, on the *Union Bank of Australia*, in *London*, to the extent of £10,000, at any time until the 29th of March, 1869.

The obtaining of that letter of credit was mentioned in the report of the directors, presented at the meeting of the 29th of October, 1868.

The following is the statement contained in the report:—

"In addition to the bank credit for £10,000 with which Mr. *Jamieson* had been hitherto furnished to enable him to conduct the financial wants at *Rangoon*, another credit for £5000 has been forwarded, which Mr. *Jamieson* advises will be of great assistance in his operations."

That report was read and adopted at the said meeting.

It did not necessarily follow because a letter of credit for £10,000 was obtained that the directors would act upon it, in violation of Art. 50, by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one-half of the paid-up capital of the company. The directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of £5000 might have been

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taken up and paid off, and then another sum of £5000 taken up under it without an excess of authority.

At the time of the adoption of the report, on the 29th of October, 1868, the letter of credit then existing was to expire on the 29th of March, 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for £10,000 authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the directors had any intention to renew the letter of credit or to borrow money upon it after the 29th of March, 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for £10,000, or even to borrow upon it £10,000 at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow £10,000 at one time on the 11th of February, 1871, more than two years after the date of the meeting of October, 1868, and when the company might possibly consist of an entirely different body of shareholders.

But however this may be their Lordships are of opinion that there was no evidence to shew that any sufficient notice of the substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know or even to imagine that the directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the directors, to be laid before the meeting, an act of the directors in excess of their authority could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the company would have become charged as a security for the repayment of the amount.

The case of *Royal British Bank* v. *Turquand* (1), and the same case in error (2), were cited in the course of argument to shew that the excess of authority was a matter only between the shareholders and the directors, and that it does not affect the rights of the bank. In that case it was said by Chief Justice *Jervis:* "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more. The party here (that is in *Turquand's Case*) on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the bank had referred to clause 50 of the articles of association they would have found that the directors were expressly prohibited from borrowing beyond a certain amount.

The case of *Royal British Bank* v. *Turquand* (1) was decided with reference to a company registered under 7 & 8 Vict. c. 110, and Chief Justice *Jervis* remarked that the lender finding that the authority might have been made complete by a resolution would have had a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done. In the present case, however, the bank would have found that, by the articles of association, the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors by Art. 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of sect. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of sect. 53 of the *Companies Act*, and would have been found amongst his records.

Their Lordships are of opinion that the learned Recorder was

(1) 5 El. & Bl. 248. (2) 6 El. & Bl. 327.

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correct in holding that this case is different from that of *Royal British Bank* v. *Turquand* (1).

It is unnecessary to consider what would have been the rights of the bank if the amount which they advanced had not been more than one-half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the bank, would have exceeded the amount which the directors were authorized to borrow. In the present case, the £10,000 and £5000 were both lent by the bank itself.

It was argued that the advances made by the bank under the letter of credit did not amount to a lending by the bank or a borrowing by the directors. There is nothing in that objection. If, however, it was not a borrowing, the directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the directors were authorized to mortgage or charge the property of the company.

For the above reasons their Lordships are of opinion that the Plaintiffs are not entitled as against the Defendant to a charge on the property beyond the amount of one half of £17,100, the paid-up capital of the company.

The amount therefore allowed to the Plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and that it be declared that the Plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of £8550 only.

It was objected at the hearing on the part of the Appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the Appellant does not object to the sale.

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the Plaintiffs and of the Defendant respectively, as taxed by the

(1) 5 El. & Bl. 248.

lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the Plaintiffs a sum of rupees equivalent, at the rate of exchange current between *Rangoon* and *England* at the time of the filing of the suit, to the principal sum of £8550, with interest thereon, at the rate of 8 per cent., from the 5th of October, 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the Defendant Appellant.

The Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Lawford & Waterhouse.*
Solicitors for the Respondent: *Murray, Hutchins, & Co.*

PREM NARAIN SINGH AND OTHERS . . . DEFENDANTS;

AND

PARASRAM SINGH AND BHOLONATH SINGH . . . . . PLAINTIFFS.

PREM NARAIN SINGH AND OTHERS . . . DEFENDANTS;

AND

ROODER NARAIN SINGH AND OTHERS . PLAINTIFFS.

J. C.*
1877
March 23, 24.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Ikrarnamah set aside—Undue Influence.

In this case, an ikrarnamah whereby the three Plaintiffs (two of them being under age) parted with half of their property, without consideration, whilst not fully acquainted with their rights, without professional advice, and during a state of things likely to overawe them and materially affect the free exercise of their will, was set aside.

APPEAL from a decision of the High Court (August 30, 1873), reversing a decision of the subordinate Judge of *Bhagulpore* (April 15, 1872), and decreeing to the Respondents the relief prayed for

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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PREM NARAIN SINGH v. PARASRAM SINGH.

PREM NARAIN SINGH v. ROODER NARAIN SINGH.

by them. The facts of the case are sufficiently stated in the judgment of their Lordships.

Leith, Q.C., and *C. W. Arathoon*, for the Appellants.

Cowie, Q.C., and *Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER :—

This suit was brought under the following circumstances. *Theoraj Singh* had three sons. One of his sons, *Tej Narain*, who died in 1819, left two widows, who died respectively in 1857 and 1859. The widow who died last left a daughter *Sribatti*, who married *Omrao Singh*,—a daughter who became insane during her mother's lifetime. This daughter had three sons, *Rooder Narain*, *Parasram*, and *Bholonath*, who are the Plaintiffs in the two suits, which may be treated for all purposes as one. The Defendants are, some of them the sons, and others the grandsons of *Behari* and *Purbhoo Narain*, the other two sons of *Theoraj Singh*. The Plaintiffs bring their suit for the purpose of setting aside an ikrarnamah, executed by them on the 22nd of December, 1859, whereby they gave up what may be stated generally as a half of their share of the property of their grandfather *Tej Narain* to the Defendants, and they also claim to recover that half which they then gave up.

The subordinate Judge decided the case in favour of the Defendants, dismissing the Plaintiff's suit. That decision was reversed by the High Court, who set aside this ikrarnamah upon grounds which may be thus shortly stated,—that the ikrarnamah was given without consideration; that the eldest Plaintiff was just of age, and the two others under age, at the time that it was granted; that they executed it without sufficient information of their rights. or sufficient advice, and under undue influence and pressure.

It appears to their Lordships convenient in the first place to consider what were the rights of the respective parties at the date in the case which is most material, namely, the death of *Indrabatti*, the latter surviving widow of *Tej Narain*, which occurred on the

7th of December, 1859. At that time *Sribatti*, the daughter of *Indrabatti*, was alive and married to *Omrao Singh*, but a lunatic. Her three sons, who have been before mentioned, were, according to their Lordships' view, of about the ages which are ascribed to them by the High Court; but they do not think it necessary, any more than the High Court did, to state precisely what they consider to be the age of each. It will be enough to say that the eldest does not appear to have been very much over age. According to their Lordships' view, these three grandsons of *Tej Narain* were clearly entitled to the property of *Tej Narain*.

Then comes the question, what that property was? Now it appears that in 1802, a deed of family partition was executed. At that time the mouzahs belonging to the family were fifty. Two may be put out of the question. One seems to have been appropriated to the support of the widow of *Deoraj*, a brother of *Theoraj Singh*; forty-eight remain. Of those, forty were divided among the three brothers, *Behari*, *Tej Narain*, and *Purbhoo Narain*; *Tej Narain* taking fourteen, and the other two brothers thirteen. It appears further that there were eight mouzahs which were held free from Government revenue, and which were not divided either by name or by metes and bounds, but with respect to which there is this general expression at the end of the document: "Whereas we, all the shareholders, have divided among ourselves all the villages belonging to our ancestral inheritance." The effect of this document appears to their Lordships to be that, with respect to the forty villages, they were actually divided, as it were, physically; and with reference to the others, that there was a division, each party having a third share. And it appears to them further, that the High Court is right in saying that this division was recognised, for they come to the conclusion that upon the death of *Tej Narain* his widows were permitted and did take possession, and keep possession, not only of the fourteen mouzahs, but of the undivided share, as far as it could be taken possession of, of the other mouzahs; they were permitted to take possession and did retain possession until their deaths.

That being so, in their Lordships' view, *Rooder Narain*, *Parasram*, and *Bholonath*, the Plaintiffs, were entitled clearly to the whole property in dispute; and their uncles and cousins, who

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were the Defendants, had no title or claim to title to any portion of them. It has been indeed said that before a certain decision, which is called the *Shivagunga Case* (1), there may have been an impression that the law was different, but, on referring to that case, it does not appear to their Lordships that it bears upon the present question. It may be enough to say that in that case it was decided that "in a united Hindu family" (and that term must be borne in mind) "where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or, in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all rights," and so on. Then, "Where property belonging in common to a united Hindu family has been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property." But in this case it appears to their Lordships that at the date to which reference has been made, namely, the death of the last surviving widow, *Indrabatti*, there was no joint property and no joint family, for not only had the property been all divided in 1802, but the family were separated in food and in lodging. It appears to their Lordships, therefore, that even if this *Shivagunga Case* (1) had never been decided, there could have been no rational doubt or dispute that the Plaintiffs were the heirs of their grandfather in respect to the whole of the estate now claimed.

Those being in their Lordships' view the rights of the parties, it remains to inquire what was done. There is undoubtedly a good deal of conflicting evidence, but the view which their Lordships take of it is in substance this: The Defendants, *Inder Narain*, *Bodh Narain*, and *Ram Gopal*, appear to have come to the family house, from which the deceased had removed shortly before her death to a place which is sometimes called *Babhni*. They appear to have come with a large body of retainers, undoubtedly calculated to inspire terror, and to have taken possession of the whole property of the deceased, to which they had no right whatever,

(1) *Katama Natchiar* v. *Rajah of Shivagunga*, 9 Moore's Ind. Ap. Ca. 539, marginal note.

thereby acquiring a very great advantage over these young men. It may be that the young men were prepared also to resist, and to use force for the maintenance of their rights, and that they would have been assisted by their father, *Omrao*, and by *Juggat*, as he is sometimes called, or *Jugroap*, the father-in-law of the eldest of them. Both sides appear by their petitions to have entertained serious apprehensions of an affray. The Government thought it necessary to interfere. They sent officers for the purpose of keeping the peace, and they issued orders summoning the parties before them, and binding them to keep the peace.

It was in this state of circumstances that the proceeding took place to which great importance has been attached by the Appellants. What is called a punchayet was formed. Three persons acted as arbitrators, *Hem Narain*, and *Dabi Singh*, who appear to have been neighbouring zemindars, and *Juggut Koonwar*, who was the father-in-law of the eldest of the grandsons. We have but little information as to what was referred to this punchayet and what the punchayet recommended, in fact almost the only information on this subject which we have is from a deposition of *Dabi Singh* taken in another suit, to which suit perhaps it may be as well now to refer for the purpose of getting rid of it. It appears that soon after the execution of this ikrarnamah *Omrao Singh*, the father of the Plaintiffs, filed a suit for the purpose of obtaining possession of the property in dispute on behalf of *Sribatti*, his wife, whom he alleged not to have been a lunatic at the time of the death of *Indrabatti*, and therefore to have succeeded to her inheritance. He also in that suit sought to set aside this ikrarnamah. That case came before this Board (1) and was eventually decided upon the ground that it was shewn that *Sribatti* was a lunatic and could not inherit, therefore *Rooder Narain*, *Parasram*, and *Bholonath*, her sons, would inherit instead of her. That was the only point decided. Their Lordships at this Board gave no decision whatever upon the question of the ikrarnamah. So much by way of parenthesis. This witness, *Dabi Singh*, who had been examined in that case, gives an account which appears to be almost the only account we have of what took place before the punchayet. He says, "No coercion, &c., was exercised on any one. *Baboo*

(1) *Rodnarain Singh* v. *Omrao Singh*, 13 Moore's Ind. Ap. Ca. 519.

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Omrao Singh also was present at the time of the execution of the ikrarnamah, and he also consented to the execution of the ikrarnamah, at the same time having appointed a punchayet composed of *Baboo Hem Narain Singh* and me the witness, and *Juggut Narain Konwar* and others. He said in an entreating manner that *Rooder Narain Singh's* grandmother has said that she gave an eight annas share to her daughter's sons, and an eight annas share to *Baboo Inder Narain Singh*, and others, the husband's relatives. In conformity with this, settle our dispute. We did so accordingly," and so on. With respect to this it may be observed that, on the part of the Defendants, evidence was given to the effect that the widow *Indrabatti* had in fact treated the Defendants as entitled to the property, but had put it to them as it were *ad misericordiam* to allow her grandsons to have a half share of it. The High Court disbelieved that evidence; and it would appear that they disbelieved also this statement of this witness. If this statement is untrue, we have no reliable evidence whatever of what came before the punchayet or what was done by it. If it is true it would appear to amount to this, that the Defendants having with a high hand taken possession of an estate to which they had no right, the father of the Plaintiffs, who is sometimes described as a timid man, entreats them to give half to his sons, on the ground that *Mussumat Indrabatti* had left it to them, or desired that it should be left. If this be so, so far from shewing that the Plaintiffs were acquainted with their rights, it tends to shew that they were not acquainted with them; and that they had some notion that *Indrabatti* had a power of disposing of the estate, which she had not. But the compromise, as it has been called, entered into in reference to this punchayet is altogether silent as to what is recommended to be done by the arbitrators. It is to this effect: "Whereas, in consequence of the death of *Indrabatti*," and so on, "who was our maternal grandmother, and my (*Baboo Omrao Singh's*) mother-in-law, a dispute about her estate existed between us," and so on; "and whereas, by the arbitration of a punchayet composed of" so and so, "besides respectable neighbours, the dispute between us, which might have resulted in a serious affray, was settled amicably between us by the arbitrators to-day, and now there is no cause of dispute which

might result in an affray between us; therefore we have executed this acknowledgment, undertaking to abstain from any affray. We do declare that if we again raise any cause for an affray we shall personally, without demur, pay a fine" of so and so. This document is altogether silent as to any division of the property or anything to be done by the parties, except to abstain from an affray; and it may be here observed that it would appear conclusively from this document, what indeed might be inferred from other evidence that there was very serious apprehension of an affray, and that a breach of the peace was, to say the least, imminent, a state of things altogether inconsistent with the account of the Defendant's witnesses (the one subject on which they all agree) that there was not only no affray, but absolutely no apprehension on the part of anybody of the possibility of an affray, but that everything was perfectly peaceful and orderly. Seven days after the date of this document the ikrarnamah in question was executed. It may be here observed that this ikrarnamah contains no reference whatever to the punchayet or to the document which had been executed seven days before. It speaks of *Indrabatti* having taken possession of all the shares and how she sent in her lifetime for *Inder Narain* and *Bodh Narain*, and so on, "and gave us the declarants out of the whole of her share an eight annas of the immovable property." It states, therefore, a gift by this lady of half the property when manifestly she had no power to dispose of any of it. It may perhaps be here observed, with reference to the doubt expressed by the High Court, as to whether it is true that this lady did dispose or affect to dispose of the property in the manner alleged, that she asserted at the time she took possession of the property, and subsequently in a petition of 1852, that she had the sole right to the property, and that the Plaintiffs were her sole heirs. This document, which need not be further referred to, contains an agreement to divide the property between the Plaintiffs and Defendants. On the 28th of January following there was a proceeding which has been a good deal relied upon on the part of the Defendants. It appears that both these young men went before the Criminal Court, and they there made depositions which have been referred to,—depositions very like each other,—in which they state that they have been charged with

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an unlawful assembly, but deny that they had taken part in an unlawful assembly, and state the substance of this ikrarnamah as a compromise, which they had entered into for the purpose of shewing that they ought not to be convicted of any such offence, and they are bound over in their recognizances not to commit an offence. The young men seem to have been brought before the Court and put under recognizances some considerable time before, in pursuance of an order of the Court. These depositions appear to their Lordships substantially a part of the same transaction, and it may be that at this time the Plaintiffs were under the impression that the ikrarnamah they had executed was binding upon them. But, undoubtedly, not long afterwards, in the action which is brought by their father, they seek to repudiate, as far as they can repudiate, the transaction.

Looking at the whole case, the main features of it appear to be these: These young men execute a deed, whereby they part with a half of their property. It is, in their Lordships' view, executed without any consideration whatever. It is executed very shortly after they had come to their property, and when it may be considered as at all events doubtful whether they were fully acquainted with their rights; indeed the evidence in the case tends to shew that they were not fully acquainted with their rights. At the time of the execution of a most important document they do not appear to have had any professional advice; and further, the appearance of their uncles with a large force, the possession which was taken of their property, the criminal proceedings, and the other circumstances which have been referred to, constituted a state of things likely to overawe them, and materially to affect the free exercise of their will.

It appears to their Lordships, therefore, that it would not be equitable that this ikrarnamah should be upheld. Under these circumstances they are of opinion that the judgment of the High Court was correct, and they will humbly advise Her Majesty that that judgment should be affirmed, and this appeal dismissed with costs.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondents: *Henderson & Co.*

PAULIEM VALLOO CHETTY . . . . . PLAINTIFF;

AND

PAULIEM SOORYAH CHETTY . . . . . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

Mitakshara Law—Separate Estate—Education out of Joint Funds—Concurrent Judgments on Fact allowed to be disputed.

Concurrent judgments of two Courts on a question of fact allowed to be disputed because the question of fact appeared to be a good deal mixed up with law.

It was contended in a suit to set aside a will that under Mitakshara law property acquired by a son by successful trading and the exercise of industry and intelligence, became joint in contemplation of law if the nucleus with which he commenced trading was derived from his father, or if he had been educated out of the joint funds of the family:—

Held, on the evidence, that such nucleus had not been derived from his father, and that the son had not been educated out of any joint fund, but out of the separate estate of the father; otherwise very strong and clear authority would be required to support the above contention, which, if correct, would incapacitate a Hindu who has received any education out of joint funds from ever acquiring separate estate.

APPEAL from a decree of a Full Bench of the High Court (March, 11, 1875) affirming a decree of the High Court on appeal (February, 3, 1875), which reversed a decree of *Kernan*, J., on the original side of the High Court (July 14, 1874).

The nature of the suit and the facts of the case appear in the judgment of their Lordships.

All three Courts found (*dissentiente Holloway*. J.), as a matter of fact, that the property in dispute was not ancestral property in the hands of the testator, *Aroonachellum Chetty*, but that it was his self-acquisition. All three Courts further found that *Aroonachellum Chetty* had full testamentary power of disposition over the whole of his property as such self-acquisition. *Holloway*, J., dissented on the ground that the property was not self-acquired, and held that

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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there was ground for presuming that a nucleus had descended to *Aroonachellum Chetty* from his father *Mauree.*

Sir *James Stephen*, Q.C., and *Mayne*, for the Appellant, contended that upon the facts found by all the Courts they should have held that under Mitakshara law the property of *Aroonachellum* was joint and ancestral family property. There being no facts in dispute, the decision of this point turned exclusively upon considerations of law; and therefore the rule of the Judicial Committee against disturbing the concurrent findings of two Courts did not apply in this case. The presumption of Hindu law is in favour of possession by one member of a joint family being joint possession by all; and where any property, however small, has descended, it remains as a nucleus, all accretions round which are joint and not separate acquisitions. It was further contended that because *Kistnamah* and *Aroonachellum* had been educated by and at the expense of *Mauree*, qualified and fitted for business by him and advanced in life by him, therefore the property subsequently acquired by them was joint ancestral estate: see Mitakshara, ch. I., sects. 4, 6, 7, 8, at p. 385 of *Stoke's* edition; Smriti Chandrika (*Madras* translation), c. 7; Madhavya (a work of the last half of the fourteenth century), pp. 48, 49, in effect a repetition of the Mitakshara doctrine. This law has never been treated as obsolete, and even if it be shewn to be obsolete in one locality, in another where it is not obsolete it would require legislative enactment to remove it; *e. g. Bombay* Act VII. of 1866 was passed to limit a son's liabilities in *Bombay* for the debts of his father. Hindu law takes no notice of the smallness of the nucleus. [SIR BARNES PEACOCK:—This property came to the son by will, not by inheritance. The passages cited relate to inherited property. SIR JAMES W. COLVILE:—*Mauree's* property was self-acquired, and therefore not joint property, and the sons had no interest in it; they were not coparceners with their father. When it is said that the education was acquired to the detriment of the ancestral property, we must look to the character of the property at the time]. The following cases were referred to: first, that of the dancing girl, *Chakalonda Alasani* v. *Chakalonda Ratnachalam* (1). [SIR MON-

(1) 2 Madras, H. C. 56.

TAGUE E. SMITH :—That was a case of special training; it does not follow that a case of general training like this would stand on the same footing.] As for the Mitakshara law of acquisition, see *Ramasheshaiya Panday* v. *Bhagavat Panday* (1); *Shudanund Mohapattur* v. *Bonomallee Doss Mohapattur* (2); *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (3); *Durvasula Gangadharudu* v. *Durvasula Narasammah* (4), a case relating to the professional earnings of a vakeel; *Bai Manchha* v. *Narotamdás Káshidás* (5).

If the property of *Aroonachellum* was in contemplation of law ancestral, it followed that a will which awarded to his son and grandsons little more than an eleventh of the whole estate was invalid. According to the *Bengal* authorities upon Mitakshara law, even an alienation *inter vivos* of less than the share of one coparcener would be wholly invalid as against the other coparceners. According to the *Madras* decisions it would be valid to the extent of the share of the coparcener who made the alienation. It was submitted that the *Bengal* view was the sound one; but even upon the *Madras* view of the law all alienations beyond one half of the property would have been invalid, even if made during the lifetime of the father. Further than that, wills are an exceptional form of alienation under Hindu law; and it was submitted that *Aroonachellum* had not the same power to devise as he would have had to alien during his lifetime. As regards ancestral property, the principle of survivorship operated at the moment of death, to the exclusion of the power of bequest. For authorities as to the above points see *Virasvami Gramini* v. *Ayyasvami Gramini* (6); *Palanivelappa Kaundan* v. *Mannáru Naikan* (7); *Vitla Butten* v. *Yamenamma* (8); *Cosserat* v. *Sudabert Pershad Sahoo* (9); *Sadabart Prasad Sahu* v. *Foolbash Koer* (10); *Nathu Lall Chowdhry* v. *Chadi Sahi* (11); *Haunman Dutt Roy* v. *Baboo Kishen Kishore Narayan Singh* (12); *Gangubai* v. *Ramánna* (13); *Vasudev*

(1) 4 Madras, H. C. 5.
(2) 6 Suth. W. R. 256, 259.
(3) 13 Moore's Ind. Ap. Ca. 542, 547.
(4) 7 Madras, H. C. 47.
(5) 6 Bomb. H. C., A. C. 1.
(6) 1 Madras, H. C. 471, 474.
(7) 2 Madras, H. C. 416.
(8) 8 Madras, H. C. 6.
(9) 3 Suth. W. R. 210, 212.
(10) 3 Beng. L. R. F. B. 32; on appeal, Law Rep. 3 Ind. App. 7.
(11) 4 Beng. L. R. A. C. 15, 19.
(12) 8 Beng. L. R. 358.
(13) 3 Bomb. H. C., A. C. 66.

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Bhat v. *Venkatesk Sanbhav* (1); *Udarám Sitáram* v. *Ránee Pánduji and the Venhu Pánduji* (2).

Cowie, Q.C., *J. B. Norton*, and *Eardley Norton*, for the Respondent:—

The property in dispute was held by all three of Indian Courts to be in fact the self-acquisition of the testator, *Aroonachellum*, and not to have been, as a matter of fact, ancestral property descended to him either from his father or grandfather, or in any way acquired by the use of ancestral funds. [SIR MONTAGUE E. SMITH:—Nominally it is a finding of fact, in reality it is a decision of law.] The three points for discussion are, did *Mauree* leave any property to which *Aroonachellum* succeeded as heir? Was there a nucleus material or intellectual round which his acquisitions gathered? Was the property left by *Aroonachellum* ancestral property? Although the ordinary presumption of Hindu law is in favour of a Hindu family being joint and undivided, and all their gains being joint family property, such presumption was entirely rebutted by the Respondent, who established that no nucleus of any family property ever came to the hands of *Aroonachellum* from any source whatever. On the established facts of the case no question of law arises, except as to the effect of the education received by *Aroonachellum;* assuming that his property was not derived from his ancestor, or out of a nucleus of family estate, *Aroonachellum* having received his primary education at the cost and charges of his father, *Mauree*, cannot, according to Hindu law and custom, impress his separate self-acquisitions with the character of joint family property as between him and his son and the Appellant. If the argument on the other side were correct, there could be no self-acquisition at all in a Mitakshara joint family. The texts from the Smriti Chandrika and Madhavya are not of authority, though they were cited in the *Madras* Courts. And what the Mitakshara says in the passage cited on the other side must be understood to relate to the administration of the joint estate, in which others than the father have acquired a vested right: see *Dhunookdaree Lall* v. *Gunpat Lall* (3), which

(1) 10 Bomb. 157, 161. (2) 11 Bomb. 76.
(3) 10 Suth. W. R. 122.

was a Mithila case, though substantially the same law as the Mitakshara.

It would be a premium upon ignorance if it be held that the acquisition of the most elementary education at the expense of the joint estate is to preclude any other acquisition. The case of the dancing girl was not a case of science at all, and the judgment of *Collett*, J., in that case, was directly opposed to that of *Holloway*, J. This rule regarding a nucleus must not be understood to apply to the case of funds expended in the acquisition of the preliminary means of acquiring, but to the case of joint family property being used as a means of actual and immediate acquisition. See *Elberling* on Inheritance, p. 92, citing Mitakshara and Dàyabhāga; *Strange's* Hindu Law, vol. i. pp. 213–215; *Colebrooke's* Digest [*Madras* Ed.], vol. ii. pp. 451, 455, 457; *Strange's* Manual, sec. 143, "Property acquired by means of any art, &c." In *Durvasula Gangadharudu* v. *Durvasula Narasammah* (1) the judgment of *Holloway* and *Kindersley*, JJ., carried the doctrine to its fullest extent. It was the case of a vakeel, and there was only a general education. In *Bai Manchha* v. *Narotamdás Kashidás* (2) *Couch*, C.J., declined to go in the face of the *Madras* decisions. See *Strange's* Hindu Law, vol. ii. pp. 373–4; *Mohabeer Kooer* v. *Joobha Singh* (3).

Sir *James Stephen*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This case has been argued at considerable though not unnecessary length, and in the course of the argument several questions of law of much importance have been raised; but, in the view which their Lordships take of the case, it ultimately resolves itself into one or two questions of fact attended with no great difficulty.

Those questions arise in this way: *Chuckeray*, the original Plaintiff, upon whose death the present Plaintiff, his son, was substituted on the record, was the son of *Aroonachellum*. *Aroon a-*

(1) 7 Madras, H. C. 47. (2) 6 Bombay, A. C. 1.
(3) 16 Suth. W. R. 221.

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chellum was one of four brothers, sons of *Mauree*. *Chuckeray* brought his suit for the purpose of setting aside the will of *Aroonachellum*, made in favour of his brothers, upon various grounds; but the only ground now necessary to refer to is that the property of *Aroonachellum* was joint, because it was ancestral—derived from his father—and therefore that *Aroonachellum* could not dispose of it by will, or, at all events, could not dispose of more than a part of it.

This case has come before three Courts in *India*. It was first heard by Mr. Justice *Kernan*, who framed his decree on the ground that, in his opinion, the property of *Aroonachellum* was not ancestral, but was self-acquired. The case then came before the Chief Justice and Mr. Justice *Holloway*, who differed in opinon; the Chief Justice holding that the property was self-acquired, Mr. Justice *Holloway* holding that it was ancestral. The opinion of the senior Judge prevailing, there was an appeal to a Full Bench High Court, which, with the exception of Mr. Justice *Holloway*, held that the property was self-acquired, and that the will was valid. Their Lordships have not in this case insisted on the rule that they will not permit, under ordinary circumstances, the concurrent judgment of two Courts on a question of fact to be disputed because the questions of fact appeared to be a good deal mixed up with questions of law.

On the part of the Appellants it was not denied that *Aroonachellum* had, in the ordinary sense of the word, made his own fortune, that the property which he devised to his brothers was acquired by his successful trading and by the exercise of his industry and intelligence; but it was contended that that property was to be deemed in point of law to have been derived from his father *Mauree*, firstly, because he had originally received a certain amount of property from *Mauree*, with which he had commenced his trading, and which became, as it has been termed, the nucleus round which his fortune gathered; and, secondly, because, even if he did not acquire anything from his father, nevertheless, inasmuch as he was educated out of the funds of the family, all his acquisitions became joint in contemplation of law.

The first question is a pure question of fact. Upon it *Sooryah*, the Defendant, the executor of the will of *Aroonachellum*, was

examined, and he is reported by the Judge of the Court of first instance to have been a satisfactory and trustworthy witness. This witness, amongst other things, says, "The sons of *Mauree* got no property of our father; on the contrary, we supported the father. He was dubash in *Baker's* house in 1805 or 1806. *Kistnamah*"—he was the eldest son—"was not assisted by any funds derived from my father. *Mauree* suffered loss to 25,000 or so, and *Kistnamah* paid that out of his own money. Then he further says, "especially that *Mauree's* assets were not enough to pay debts,—insolvent, in fact. The debts *Mauree* left were ten times larger than the property he left. We paid a lakh for Court costs after his death from 1814 to 1834. *Kistnamah* carried on on his own account; so did *Aroonachellum*; so did *Cothundaram* and self"—that is, the other brothers. "During the life of father we were always in the same house living, and also *Sawmy*"—he was a cousin—"and cooked and ate together. Up to the death of *Mauree* there was no division. We each worked separately, and the brothers had to pay 30,000"—rupees or pagodas, it does not appear which—"for the debts of father, owing to security given by him, but we laboured separately, and had our property separate."

In their Lordships' opinion, if this evidence, uncontradicted as it is, had stood alone it would have amply supported the finding of fact of the three Courts. But it is materially corroborated. In the first place, it is corroborated in this way: A suit was brought against *Mauree* in 1805 (*Mauree* died in 1814) by one *Devaljee*, who had obtained a loan from *Mauree* on a mortgage, *Devaljee* alleging that *Mauree* held possession of the mortgaged premises and received the proceeds for a long time after the mortgage had been paid off. This suit was attended with considerable expense to *Mauree* in his lifetime; and it went on, and was a source of great expense and considerable loss to his sons, until it was finally decided in 1835. We have the Master's various reports in the course of it; and it is enough to say that from these reports it appears that *Mauree* at the time of his death had been overpaid to the amount of more than 8000 pagodas, which he owed to *Devaljee*, and that this sum exceeded considerably any assets which *Mauree* had. *Mauree* left a will leaving his property to his sons.

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But their Lordships do not think it necessary to determine a question raised here, though apparently not in *India*, whether if there had been a surplus after satisfying *Mauree's* liabilities, his sons would have taken by descent or by devise. Three of his sons renounced probate. The eldest son, *Kistnamah*, took out administration with the will annexed, and, as administrator with the will annexed, obtained possession of the property. It appears that *Kistnamah* up to the time of his death retained this property, as it was right and prudent for him to do, in order to meet the possible adverse result of the suit of *Devaljee*; that in defending the suit, and in the expenses of administration, he disbursed considerably more than the whole value of the property; and that, although the greater part of these disbursements were ultimately disallowed as against the creditors, the representatives of *Devaljee*, the deficiency was made good out of his estate; that after his death, which occurred in 1826, no assets of *Mauree* came to the hands of his surviving sons except the half-share of the garden at *Athepattam* and some other immoveable property of small value, all of which was afterwards sold under the final decree of the Court in satisfaction of the claim of *Devaljee's* estate.

The statement of the witness *Sooryah* is also further corroborated in this way:—one *Narrainsawmy*, the son of *Kistnamah*, the eldest son of *Mauree*, brought a suit very much of the same description as the present for the purpose of disputing the will of *Kistnamah*, on the ground that *Kistnamah's* property was joint. In that suit the whole of the family agreed in treating the property of *Kistnamah* as self-acquired; and if *Kistnamah's* property was self-acquired, and not derived from *Mauree*, some presumption arises that the property of *Aroonachellum* was not derived from *Mauree*.

On these grounds their Lordships entirely concur with the finding of the Courts upon the first question; namely, that *Aroonachellum* did not receive any property from his father on which he commenced his trading, or which could in any sense be properly called the nucleus of his trading fortune.

The next contention is: that *Aroonachellum* having been educated out of the joint funds of the family, his acquisitions became

in point of law joint. In support of the allegation of fact on which it is sought to found this legal inference the only evidence produced is the answer of the Defendants, *Sooryah* among them, in a suit filed by one *Sawmy*, a grandson of *Nullamutta*, who was the father of *Mauree*; *Sawmy* contending, amongst other things, that the property of *Mauree* was ancestral, derived from *Mauree's* father *Nullamutta*; and the four brothers, *Kistnamah*, *Aroonachellum*, *Cothundaram*, and *Sooryah*, contesting that proposition, and contending that the property of their father *Mauree* was self-acquired. That answer contained this passage: "*Aroonachellum* was educated by his said father *Mauree* by and out of his separate funds or means; and when this Defendant *Aroonachellum* was of sufficient age he was put forward in life by his said father, and by and through his means and influence only, and afterwards by and through the industry and exertions of this Defendant *Aroonachellum* on his own behalf. If this passage be relied upon as an admission it must be taken as whole, and it contains a distinct assertion, that whatever were the charges of *Aroonachellum's* education—and it nowhere appears what sort of education he had—those charges were borne by the separate estate of his father, over which he had an absolute power of disposition. There was, therefore, at that time, no joint estate in the proper sense of the word; and the foundation of fact then fails upon which the legal inference was to have been based.

This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the Appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for.

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It appears to them, further, that the case reported in the 10th vol. of *Sutherland's* 'Weekly Reporter,' in which a judgment was given by Mr. Justice *Jackson* and Mr. Justice *Mitter*, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in *Madras;* the first being to the effect that a woman adopting a dancing girl, and supplying her with some means of carrying on her profession, was entitled to share in her gains; and the second to the effect that the gains of a vakeel who has received no special education for his profession are to be shared in by the joint family of which he was a member; decisions which have been to a certain extent also acted upon in *Bombay*. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of *Bengal* is not more correct than what appears to be the doctrine of the Courts of *Madras*.

For these reasons their Lordships are of opinion that the judgment of the Court below was right, and they will humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed with costs.

Solicitors for the Appellant: *Keen & Rogers.*
Solicitors for the Respondent: *Talbot & Tasker.*

VASUDEV SADASHIV MODAK . . . . . PLAINTIFF; J. C.*

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THE COLLECTOR OF RATNAGIRI . . . DEFENDANT. *March* 1, 2.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

The Pensions Act, 1871, *s.* 4—*Deshmukhs—Jurisdiction of Civil Courts.*

In a suit to recover from the Government certain emoluments due to the Appellant as deshmukh of four mehals, the Appellant alleged in his plaint that he was the hereditary deshmukh thereof; that as such, he and his ancestors had long been entitled to receive from the ryots a percentage upon that part of the revenue which was assessed in cash; that such rights were confirmed by a sunnud granted in 1777; that up to 1842 he received his dues directly from the ryots, but that since 1842 the Government had received them on his behalf, but in respect of the sums claimed had not accounted to the Appellant:—

Held, that the Judge was right in dismissing the suit before the settlement of issues, on the ground that it was excluded from the jurisdiction of the Civil Courts by the *Pensions Act*, 1871, s. 4.

The deshmukh's right, in its inception and original character and under the terms of the sunnud, is within the scope and operation of that section; and even as at present existing, irrespective of the terms of the sunnud, would fall within the scope of sect. 3.

APPEAL from a decree of the High Court (October 1, 1874), confirming a decree of the district Judge of *Ratnagiri* (October 24, 1873), whereby he dismissed the suit brought on the 31st of March, 1873, as not being within the jurisdiction of the Civil Courts. The sole question was whether the suit fell within the provisions of Act XXIII. of 1871, sect. 4; whether that section, as interpreted by sect. 3, applied to the office of a watandar deshmukh (hereditary supervising tax collector) in the Presidency: see *Rangoba Naik bin Raghoba* v. *The Collector of Ratnagiri* (1). The description of the office of deshmukh given in the printed case filed in behalf of the Collector of *Ratnagiri* was as follows:—"It is ancient and hereditary. Anciently its duties chiefly consisted in superintending the collection of the Govern-

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 8 Bomb. A. C. 112.

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ment revenue, payable in money or in kind, by subordinate officials. Under the British Government the functions of the office in the *Ratnagiri* district were formerly (in the early part of the British rule) to attest all revenue and criminal proceedings before the mamlutdars, to furnish information as to the system of land revenue, to assist in its settlement, and to give general aid to the Collector of his district. These functions became gradually nominal, and recently they have been affected by the *Bombay* Summary Settlement (Act VII. of 1863) which proposed to relieve the deshmukhs generally of liability to service on payment of a certain quit-rent on the survey assessment of their holdings. Some deshmukhs have accepted the above proposition, others continue to serve personally or by deputy. These latter assist the mamlutdars in the preparation of the land revenue papers and in such other duties as may be entrusted to them, differing in no respect from ordinary karkoons (writers) on the mamlutdar's establishment. Originally the deshmukh's services seem to have been remunerated by various emoluments or allowances, consisting sometimes partly of land in his district, and partly of a proportion of the Government revenue, and sometimes exclusively of a percentage collected by himself; the whole amounting to about 5 per cent. of the revenue actually realised."

The Appellant alleged that the office of watandar deshmukh of certain specified mehals had been held by his family for 400 or 500 years. In 1777 the right of his ancestors to collect these dues from the ryots was confirmed by the Peishwa by a sunnud; the material portions of which are as follows:—

"[Whereas] *Sadáshiv Raghunath* and *Balaji Govind Modak*, deshmukhs [of] the mehals aforesaid, came . . . . and represented as follows:—

"The deshmukhi watan of the mehals above-named belonged to us from olden times, and accordingly our ancestors and forefathers were in enjoyment of the [18] watan; but the haks (rights) relating to the deshmukhi (namely, the rights of levying) directly from the rayyats, half an anna for every rupee of the Government jamabandi (revenue collected) (in cash); half a maund on every candy of galla (grain assessment); the same rate as that on the cash amount (assessment) on articles (sold) by the weight; half a

maund of ghee on every candy of ghee (sold) by the gavlis (milkmen); and two annas and a half on every thousand of the articles (sold) by the number; which rights are an old nemûk (allowance) . . . . (We therefore) now (humbly pray that you) will be pleased to . . . . order the grant of letters (to us, authorizing the levy of our) deshmukhi haks . . . . We are graciously pleased to grant this ajnapatra. Do you (the mahajuns and khots of the said mehals) therefore cause the amount of their hak on the Government jamabandi, whatever it may amount to according to the established practice, to be paid by the rayyats to them, their sons, and grandsons, &c., from generation to generation."

Up to the year 1842 these dues, whether in grain or cash, were collected by the Appellant's ancestors and by himself directly from the ryots; but after that year the Government officials collected them with the regular revenue and paid them over to the deshmukh.

In 1866–67 a new survey came into force. The grain assessments were abandoned, and a consolidated cash assessment was introduced. When this change took place, the Appellant contended that he was entitled to receive half an anna in the rupee upon the whole consolidated cash assessment, whereas the Government contended that he was only entitled to this percentage upon the amount of the original cash assessment, and that upon the balance he could only claim such a percentage as he would have received if the amount had been levied in grain under the old system. Finally, in a suit brought by the Appellant against the Collector of *Ratnagiri*, it was decided that the contention of the former was correct, and the Collector was ordered to pay his dues at the rate of half an anna in the rupee on the entire assessment for the years 1866–67 and 1867–68.

In the year 1868–69 and the subsequent years, up to 1871–72, the Government again made default in paying over to the Appellant the entire amounts which they had collected from the ryots on his behalf, and thereupon the Appellant instituted the suit in which this appeal arose.

Cowie, Q.C., and *Mayne*, for the Appellant.

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Sir *James F. Stephen*, Q.C., and *Graham*, for the Respondent.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal against a judgment of the High Court of *Bombay* confirming a judgment of the Judge of first instance, which, before the settlement of issues in the cause, dismissed the suit of the Appellant on the ground that it was excluded from the jurisdiction of the Civil Courts by the *Pensions Act*, 1871. The material sections of the statute are the 4th and the 3rd.

The 4th says, "Except as hereinafter provided"—and it is admitted that the case does not fall within any of the statutory exceptions—"no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or grant for which such pension or grant may have been substituted;" and the 3rd, which is an interpretation section, says, "In this Act the expression 'grant of money or land revenue' includes anything payable on the part of Government in respect of any right, privilege, perquisite, or office."

It is to be observed that upon this appeal it would be impossible for their Lordships to pronounce affirmatively that the suit is not one which under the Act is excluded from the jurisdiction of the Civil Courts. The case as put by the learned counsel for the Appellant is simply that the materials before the Courts were insufficient to shew that they had not jurisdiction, and that therefore the cause should be remitted to *India* for a fuller trial there on this issue.

The materials which were before the Court were the plaint, the oral examination by the Judge of the Plaintiff's pleader, the sunnud of the 3rd of March, 1777, and the judgment in a former suit instituted by the Appellant against the Government before the passing of the Act, which is set out in the record. The question is whether, taking all these together, the Judge had not

sufficient grounds for saying that the suit was within the meaning and operation of the *Pensions Act*, 1871.

The Plaintiff's case was that he was the hereditary deshmukh of certain turufs or districts; that as such he and his ancestors had long been entitled to receive directly from the ryots a percentage equivalent to six pie in the rupee upon that part of the revenue which was assessed in cash; a smaller percentage upon that part which was assessed in grain; and certain other dues which their Lordships think may be dismissed from consideration; because, though the articles in respect of which they were payable were articles upon which revenue was levied under the former native governments, they have long since been abandoned by the British Government as the subjects of revenue, and the rights of the deshmukh in respect of them are really not in issue in this suit. The questions arising between the parties may be fully tried and determined upon the first two items of revenue.

These rights of the deshmukhs were, as the Plaintiff says, confirmed, or, as the other side put it, regranted by the sunnud of 1777. And the Plaintiff alleges that up to the year 1842 he received his dues directly from the ryots, but that since 1842 the Government has received them on his behalf, and become accountable to him for them. It is an undisputed fact that in the year 1868 there was a new revenue settlement, since which the whole of the revenue receivable by Government and assessed upon the ryots has been a money assessment, no part of the revenue being now assessed in grain.

Upon this state of facts, two distinct questions arise; first, whether in its inception and original character the deshmukh's right is not one within the scope and operation of the Act of 1871? Secondly, whether, if that be not the case, the right has not been brought within the scope and operation of the Act by the alterations in its character that have subsequently taken place?

The judgment of the High Court of *Bombay* answers the first of these questions in the affirmative, and proceeds on that finding. It says, "Now according to Plaintiff's own shewing, it is clear that the allowance was, in its inception, either a pension or a grant of money or land revenue, or both. It was a pension or annual sum conferred, and it was a grant of land revenue made for services to

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be rendered. The mode in which it was to be levied appears to be immaterial. The Government of the time, having the undoubted right to levy assessment on all cultivated lands not expressly exempted from assessment, assigned a portion of such assessment or land revenue, varying each year according to the amount of the assessment which the Government reserved to itself, for the remuneration of the watandars."

Their Lordships, without adopting every word of that judgment as their own, are of opinion that the general conclusion is correct, and think it is established by the sunnud of 1777. That document recites the representation or petition of the Appellant's ancestors, from which it appears that whatever may have been the nature of the original right, the right of receiving these haks from the ryots had, at all events for a considerable number of years, been suspended; that as early as the time of *Sivaji* the haks were resumed by the Government of the day, and the value of them credited to the Government—that is, treated as part of the general revenue of the country—certain fixed salaries being paid to the deshmukhs; and that this system, with some variation as to the amount of the salary, continued during the time of *Kanoji Angria*, and was in force when the country again came under Mahratta rule. The petition of the then deshmukhs to the Peishwa prayed to have the old and suppressed allowances restored to them; stating, however, that there was a dispute between them and certain other parties as to who were the proper watandars. The result was that the Peishwa recognised the right of the Appellant's ancestors as between them and the rival claimants, and made an order upon the mahajans and the khots of the villages of the mehals or turufs in question, enjoining them to cause the amount of the hak on the Government jamabandi, whatever it may amount to, according to the established practice, to be paid by the rayyats to the Petitioners, their sons and grandsons. Now the original right of these deshmukhs, the beginning of which seems to be lost in antiquity, was substantially, as the High Court has put it, in the nature of a grant of revenue. Their functions were those of a collector of revenue for the Government. They were authorized to retain out of what they received from the ryots, a certain percentage upon that which was fixed as the Government

revenue for themselves, paying the balance to the Government. It is difficult to see how the Government could impose upon the ryots the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent free. The land revenue system in *India* is founded upon the notion that the State is entitled to receive a certain portion of the produce of all lands not especially exempted from assessment. Of course some governments have been more exacting than others, but the general action of native governments was to take a certain proportion. From the gross amount assessed the expenses of collection must necessarily be deducted; and whether the collectors were paid by salary, or allowed to receive a commission on their collections directly from the ryots, the sum which went into the coffers of the Government was equally reduced by the amount of their allowances.

Their Lordships are of opinion that whatever the foundation of the deshmukhs' rights originally was, the sunnud must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from ryots went into the coffers of the State, which paid its collectors by salaries; and consequently the restoration of the old allowances by the Peishwa was in substance a grant by him of part of his land revenue, and therefore falls within the terms of the 4th section without the aid of the 3rd as a grant of money or land revenue, conferred by a former government. Therefore their Lordships agree with the High Court in the conclusion to which they came upon the first question; and that is, of course, sufficient to dispose of the present appeal.

If it were necessary to go further and to consider whether the claim, however it might have stood on the sunnud, has been brought within the Act by what has since taken place, their Lordships would be of opinion that the judgment in the former suit affords sufficient grounds for so deciding.

That suit proceeded upon the alteration made under the revenue settlement of 1868. The Plaintiff appears to have claimed six pie in the rupee upon the total amount of the assessment, which

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then consisted wholly of money. The Government met that claim by a contention that upon so much of the existing assessment as might be considered to represent the former grain assessment he was entitled only to the smaller percentage. The Judge decided this question in the Plaintiff's favour, and allowed him the larger percentage upon the whole of the assessment; and did so upon this, among other grounds, viz., that by the change in the system of assessment his interest might have been affected, and therefore that it was equitable to allow him the larger percentage upon the whole of the then assessment.

His claim in the present suit adopts this definition of his rights, and seeks to enforce them accordingly. The former judgment therefore seems to shew that what is now payable by Government is so payable out of the general land revenue in respect of a right, privilege, perquisite, or office formerly enjoyed within the meaning of the 3rd section of the Act; and to negative the statement in the plaint to the effect that since 1842 the Government has received the deshmukh's allowances as something distinct from revenue from the ryots on his behalf and as his agent, under circumstances which would make them liable to him as for money had and received.

It appears, therefore, to their Lordships that no ground has been made for disturbing the judgment of the Court below, and they must humbly advise Her Majesty accordingly. They would have been extremely sorry if they had to remand the cause, because though it might have been satisfactory to have fuller information on some points raised in the argument, they are satisfied upon the materials before them that a fuller trial would equally result in the conclusion that the suit is within the *Pensions Act*, 1871, and that the Plaintiff must seek his remedy by the procedure thereby provided.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal, and to confirm the judgments below, with the costs of the appeal.

Solicitors for the Appellant: *Renshaw & Renshaw.*
Solicitors for the Respondent: *Lawford & Waterhouse.*

DELHI AND LONDON BANK, LIMITED . . PLAINTIFF; J. C.*

AND 1877

MELMOTH A. D. ORCHARD . . . . . DEFENDANT. *April* 18, 19; *May* 14.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Limitation—Execution of Decree for Money—Act XIV. of 1859, *ss.* 20, 21—*Res Judicata—Act VIII. of* 1859, *s.* 2.

A decree for money against the Respondent having been obtained by the Appellant on the 5th of October, 1866, the former made payments on account up to October, 1869; on the 22nd of which month the Appellant made a *bonâ fide* application to execute the same in respect of the unpaid balance. An order to that effect was refused by the Court which made the decree, but the Respondent nevertheless made further payments on account.

On the 4th of May, 1871, a fresh application for execution was made, which was eventually again refused, the Chief Court of the *Punjab* holding that the decree having been obtained before the introduction of Act XIV. of 1859 into the *Punjab* the case must be governed by the provisions of sect. 21 and not by sect. 20 of that Act:—

Held, that this order must be reversed. The application of the 22nd of October, 1869, was a proceeding to enforce the decree within the meaning of sect. 20, and having been taken within three years next preceding the application of the 4th of May, 1871, this last application was not barred by sect. 21.

The prohibition laid down in sect. 20 does not on the true construction of sect. 21 apply to judgments in force at the time of passing the Act.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata* or within s. 2 of Act. VIII. of 1859.

APPEAL by special leave of Her Majesty in Council from two several orders of the Chief Court of the *Punjab* (Dec. 1, 1871, and July 31, 1874) made on appeal in a proceeding or suit instituted by the Appellant bank in the Civil Court of the *Delhi* district to enforce execution of a money decree previously obtained by it against the above-named Respondent.

The first of the above two orders or decrees, bearing date the 1st of December, 1871, was made by a single Judge of the said Court, on appeal, who decided against the issuing or enforcing

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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such execution; but by a judgment and decree bearing date the 17th of March, 1873, made (on a review of judgment) by that Judge and another Judge of the same Court, who together heard the case, the former order or decree was reversed, and an order was made that execution of the decree in question should be enforced.

The second of the above-mentioned orders or decrees now appealed from, bearing date the 31st of July, 1874, was made (on a review of judgment at the instance of the above Respondent) by two out of the three Judges of the said Court who heard such review (the third being dissentient), and thereby the former decree was reversed.

The Appellant bank was the holder of a decree for money against the Respondent, and the question was as to the limitation affecting the right to execute the decree, which bore date prior to the extension of Act XIV. of 1859 to the *Punjab*, which extension took effect from the 1st of January, 1867. The decision of this question depended in the judgment of the Chief Court upon the due construction of sects. 20 and 21 of that Act.

The proceedings are sufficiently set out in the judgment of their Lordships.

On the 31st of July, 1874, the Respondent's application for review of judgment came on for hearing before the Chief Court, consisting of Mr. *Boulnois*, Chief Judge, and Messrs. *Melvill* and *Thornton*, other two Judges thereof, when the majority of the Court (Mr. *Thornton* dissenting), by their decree of that date, reversed the decree of the 17th of March, 1873, and maintained the judgment of the Commissioner of *Delhi*, dated the 18th of August, 1871, and of the Deputy Commissioner, dated the 30th of June, 1871, but made no order as to costs.

The judgment of the majority (pronounced by the Chief Judge), after noticing the conflicting decisions of the *Calcutta* and *Madras* High Courts on the one hand and of the *Bombay* High Court on the other, in regard to the true construction of Act XIV. of 1859, proceeded upon a literal interpretation of the words of the 21st section, standing by itself, which they held had the effect of excluding all prior applications for execution as operating to keep alive the decree. They considered the decree ceased to have any

force at the expiration of three years from its date or from the coming into operation of the Act, whichever had first expired.

Leith, Q.C., and *Graham*, for the Appellant bank, submitted that the above interpretation of the Act was erroneous; that having regard to the general intent of the Act and the sections immediately preceding sect. 21, it was not meant to provide that the remedy on judgments existing at the time of the coming into operation of the Act should be so curtailed, or that such judgments should be in a less favoured position than those which should be passed after the Act. Added to this, if sect. 21 were to be literally construed there would be no limitation at all to the execution of then existing judgments. They further submitted that reading sect. 21 with reference to the context, the effect was that by sect. 20 no process of execution was to issue on any decree more than three years old unless some proceeding should have been taken within the previous three years to keep it in force. Then by sect. 21 this rule was not to apply to a decree obtained before the coming into operation of the Act, such decree being capable of execution without any prior application having been made, provided that application were made within the former legal period of limitation, or within three years from the coming into operation of the Act, whichever should first expire. Also that an application to execute such decree after the first of these two last-mentioned periods should be allowed if some proceeding should have been taken by the decree holder to enforce it within the time prescribed by sect. 20.

They drew attention to the conflict of decisions in *India* upon the question of the construction of these two sections, between those of the *Bengal* and *Madras* High Courts on the one side and those of the *Bombay* High Court, followed in this case by the Chief Court of the *Punjab*, on the other. See *Karuppanan* v. *Muthannan* (1), following *Kangaleechurn Ghosal* v. *Bonomalee Mullick* (2); and on the other hand *Báiúdekúvar* v. *Mulji Náran* (3), and *Makúndá Valad Bálacharya* v. *Sitarám and Nilo* (4), which were opposed to it. They submitted that the true construction was that

(1) 5 Madras, 105.
(2) 7 Suth. W. R. 515.
(3) 3 Bomb. H. C. Ap. Cas. 177.
(4) 5 Bomb. H. C. Ap. Cas. 102.

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adopted by the Full Bench at *Calcutta* in the 7th volume of *Sutherland* to this effect: "That the words coming after the word 'but' in sect. 21 were intended as a proviso to sect. 20, and by this construction all difficulties are got rid of. The two sections read together thus will be to this effect: that no process of execution shall issue upon any judgment more than three years old unless some proceeding shall have been taken to enforce it or keep it in force within three years next preceding the application for execution; provided that process of execution in respect of a decree obtained before the passing of the Act XIV. of 1859 may be issued either within the time now limited by law or within three years after the passing of the Act, whichever shall first expire, even though no proceedings shall have been taken to enforce it or keep it in force within three years next preceding the application for execution."

For rules as to construction see *Becke* v. *Smith* (1); *Maxwell* on Interpretation of Statutes, p. 209; *Roddam* v. *Morley* (2); *Maharajah Dheeraj Mahtabchand* v. *Bulram Singh* (3).

Doyne, for the Respondent, contended that according to the plain words and due construction of sect. 21, the operation or introduction, by way of proviso or otherwise, of the 20th section, is expressly excluded, and the Appellant bank was debarred from obtaining execution after the expiration of three years from the extension of the Act to the *Punjab*. Further, assuming that the two sections are to be read together, as contended for by the Appellant, more than three years elapsed from the passing of the decree to the making of the application of the 4th of May, 1871, and the Appellant has failed to shew any *bonâ fide* proceeding to enforce or keep in force that decree in the interim. See *Bisshesshur Mullick* v. *Maharajah Mahata Chunder Bahadoor* (4). Moreover, it was held by the Commissioner that there had been no proceeding sufficient to keep the decree in force, and this finding being one of fact it was not competent to the Chief Court on special appeal to disturb. It is in this present appeal binding on the Appellant, who did not appeal from the Commissioner's judgment.

(1) 2 M. & W. 195.
(2) 26 L. J. (Ch.) 438.
(3) 13 Moore's Ind. Ap. Ca. 479.
(4) 10 Suth. W. R. (F. B.) 8.

No appeal was preferred from the first decision of the Deputy Commissioner of the 10th of December, 1869, and it was therefore not open to the Appellant bank to again raise the question of law then decided against it. [SIR BARNES PEACOCK:—Does *res judicata* apply to cases in execution. Is there any authority for this being *res judicata*, unless sect. 2 of Act VIII. of 1859 is such authority?] As to the law of limitation in execution proceedings before Act XIV. of 1859 see *Kangaleechurn Ghosal* v. *Bonomalee Mullick* (1); *Thomson* on Limitations, pp. 316, 317; *Troup* v. *East India Company* (2). The *Punjab* Code says one year; see Part II., sect. 5.

Leith, Q.C., in reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment and order of the Chief Court in the *Punjab*, dated the 31st of July, 1874, reversing on review a former judgment and order of the same Court of the 17th of March, 1873, and thereby disallowing the execution of a decree obtained by the Appellants against the Respondent for the recovery of a sum of Rs.14,508. 14*a*. for debt and costs.

The judgment was recovered on the 5th of October, 1866, in the Court of the Deputy Commissioner of *Delhi*. Subsequently to the decree the Defendant made various payments on account up to the month of October, 1869. On the 22nd of that month the Plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of Rs.19,227. 3*a*. for principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at *Meerut*, transferring the decree, in order that it might be executed in that Court.

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that on the 10th of December, 1869, the Deputy Commissioner made the following order:—

"The decree is of a prior date to the introduction of Act XIV.

(1) 7 Suth. W. R. 515. (2) 7 Moo. Ind. Ap. Ca. 104.

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of 1859. It should be executed according to the civil law of the *Punjab;* and as, according to the said law, the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that (the petition) be sent to the record-room."

There can be no doubt that the application made on the 22nd of October, 1869, was *bonâ fide*, and, indeed, the learned counsel for the Respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th of December, 1869; but the Defendant, notwithstanding the order, made further payments on account.

On the 4th of May, 1871, the Plaintiff, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs.23,772. 13*a*. 7*p*., made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of *Meerut* for execution, and prayed that a summons might be issued under the provisions of Act VIII. of 1859.

Upon that petition the Deputy Commissioner, on the 6th of May, 1871, made the following order:—

"As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room."

With reference to the statement that the period for execution had then totally expired, it may be as well to point out that Act XIV. of 1859 was extended to the *Punjab* on the 1st of January, 1867, and consequently that the period of three years from the time when the Act came into operation in the *Punjab* had expired before the application of the 4th of May, 1871, was made. On the 30th of June, 1871, the Deputy Commissioner refused to review his judgment, and on the 10th of July of that year the Plaintiff appealed to the Commissioner, who, on the 18th of August, 1871, dismissed the appeal, holding, amongst

other things, that the three years' grace under the limitation law expired on the 1st of January, 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

The case was appealed to the Chief Court of the *Punjab*, which at first rejected the appeal. Subsequently a Full Bench of that Court, on the 17th of March, 1873, upon review, decreed the appeal with costs, and, reversing the orders of the lower Courts, ordered and decreed the Appellant's application for execution with costs and the costs of the Appellant in the Appellate Court. They said:—

"The application for execution in 1869 to the Assistant-Commissioner at *Delhi* was, in the opinion of this Court, a *bonâ fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from the date of that proceeding the present application was filed."

Subsequently, on the 31st of July, 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th of March, 1873, upon the ground that the decree having been obtained before the introduction of Act XIV. of 1859 into the *Punjab*, the case must be governed by the provisions of sect. 21, and not by sect. 20. The case was decided by Mr. Justice *Boulnois* and Mr. Justice *Melvill* upon the authority of the cases of *Báiúdekúvar* v. *Mulji Náran* (1), and *Makúndá Valad Bálachárya* v. *Sita-rám and Nilo* (2). Mr. Justice *Thornton* held a contrary opinion, and recorded his reasons for dissent.

It was not contended that the decision of the Chief Court of the 17th of March, 1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

The case depends upon the proper construction to be put on sects. 20 and 21 of Act XIV. of 1859. The following are the words of those two sections:—

"20. No process of execution shall issue from any Court not established by royal charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken

(1) 3 Bomb. H. C. Ap. Cas. 177. (2) 5 Bomb. H. C. Ap. Cas. 102.

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to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

"21. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out, in the case of *Gooroo Doss Auckholee and Others* v. *Modhoo Koondoo and Others* (1), that according to the literal wording of sect. 20 no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by royal charter, after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution.

That was held to be the proper construction of sect. 20, both in that case and in the subsequent Full Bench case of *Kangaleechurn Ghosal* v. *Bonomalee Mullick and Others* (2).

In the latter case it was held that, under the 21st section, execution might issue after the expiration of three years from the time of the passing of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce the judgment within the meaning of sect. 20 had been taken within three years next preceding the application for execution.

That decision was followed by the High Court in *Madras*, in the case of *Karuppanan* v. *Muthannan* (3).

The High Court in *Bombay* put a different construction upon sect. 21. The cases are referred to in the judgment now under

(1) 6 Suth. W. R. (Mis. Full Bench Rul.) 98.

(2) 7 Suth. W. R. 515.

(3) 5 Mad. H. C. Rep. 105.

appeal (1). They held that the words, "nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act," could not be rejected without violating a fundamental rule for the construction of statutes; and that the words, "may be issued," should be read as "must be issued;" and the Chief Court treated the words, "judgment in force at the time of the passing of this Act," as applicable to a judgment in force at the time of the extension of the Act to the *Punjab*, though not in force at the time of the passing of Act XIV. of 1859.

It cannot be disputed that the construction put upon the Act by the High Court at *Calcutta*, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at *Bombay*, and by the Chief Court in the *Punjab*, is correct, a judgment creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV. of 1859 was passed, or a judgment which was in force in the *Punjab* at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the *Punjab* at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word "must," or the word "shall," may be substituted for the word "may;" but that can be done only for the purpose of giving effect to the intention of the Legislature; but, in the absence of proof of such intention, the word "may" must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words, "nothing in the preceding section shall apply to a judgment in force at the time of the

(1) See the *Bombay* cases cited on p. 133.

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passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words, "*but* process of execution *may* be issued," mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

It appears, then, to their Lordships that the words, "nothing in the preceding section" (as used in sect. 21), mean that the prohibition laid down in sect. 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the Full Bench in the *Calcutta* case above cited, their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of *Delhi*, on the 22nd of October, 1869, being *bonâ fide*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of sect. 20; and that that proceeding having been taken within three years next preceding the application made on the 4th of May, 1871, to which the judgment now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV. of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an abjudication within the rule of *res judicata*, or within sect. 2 of Act VIII. of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the *Punjab*, of the 31st of July, 1874, be reversed, and that the judgment and order of the 17th of March, 1873, be affirmed and stand in force; and that the Defendant do pay to the Plaintiffs their costs incurred in the Chief Court of the *Punjab* subsequently to that decree. The Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Johnston, Farquhar, & Leech.*
Solicitor for the Respondent: *T. L. Wilson.*

BARON FORESTER AND WIFE (WIDOW OF D. O. DYCE SOMBRE), AND ANOTHER . . } PLAINTIFFS;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } DEFENDANTS

AND CROSS APPEAL.

J. C.* 1877 April 17, 18.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Interest on Costs cannot be given in execution unless decreed.

Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.

The existing practice of the Indian Courts not to give in execution interest on costs unless specially decreed, or unless submission is made by the parties to the discretion of the Court, approved.

THIS was an appeal with a cross appeal against a decree of the Chief Court of the *Punjab* (April 17, 1875), passed in execution of an Order of Her Majesty in Council (Feb. 5, 1873).

The facts and proceedings sufficiently appear in the judgment of their Lordships.

Leith, Q.C., and *Doyne*, for the Appellants, contended that it was the practice of the Indian Courts to allow 12 per cent. per annum upon costs from the date of the expenditure or the payment of them, and that the Respondent having all along, when successful, claimed and received interest at that rate, should not be heard now to dispute the like liability. The Chief Court was right in allowing such interest on Rs.1014 which had been paid to the Respondent in respect of costs in the Judge's Court. It was wrong and inconsistent in making a distinction between what the Appellants have disbursed for their own costs and what they had disbursed for the other side. It was wrong, also, in holding that when the Order of Her Majesty in Council, dated the 5th of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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February, 1873, directed that the costs of the Courts therein referred to should be "taxed and ascertained" in *India*, it was thereby intended to direct any departure from the ordinary course of proceeding of the Indian Courts as to the allowance of interest on those costs. [SIR BARNES PEACOCK:—If there is no order of the Privy Council as to interest on costs, can the Court below award such interest?] The practice of the Courts below should be adhered to. We are entitled under that practice to interest on costs from the time we paid them. Moreover, admissions had been made by the Government in the Courts below during certain proceedings in 1864 that such interest was payable. [SIR JAMES W. COLVILE:—How can admissions or arrangements made in the earlier stage of the suit in an inferior Court affect the principles to be applied in carrying out Her Majesty's order?] See *Macpherson's* Civil Procedure [last Ed.], p. 232. Costs carry interest without an order to that effect: *Digamburee Dabee* v. *Nundgopaul Banerjee* (1); *Haradhun Sandyal* v. *Rashmonee Dassia* (2); *Singh and Others* v. *Lalla Kalee Churn* (3). So, also, interest can be given on the principal amount in execution though the decree is silent on that point: *Beerchunder Joobraj* v. *Ram Coomar Dhur* (4). [SIR JAMES W. COLVILE:—Have you any cases in which the Privy Council made an order for costs without saying anything as to interest, and which shew what is the practice of the lower Courts in dealing with such orders?] See *Rajah Leelanund Singh* v. *Maharajah Joy Mungul Singh* (5); *Maharanee Brojo Soonduree Debia* v. *Annud Moyee Debia* (6); *Rajah Lelanund Singh* v. *Maharajah Luckmessur Singh Bahadoor* (7). [*Mayne* referred to *Mosoodun Lall* v. *Bheekaree Singh* (8), which was a Full Bench decision to the effect that where a decree is silent as to interest, the Court executing the decree has no power to award interest. SIR JAMES W. COLVILE:—In that case this Court did not make a decree but only a declaration, leaving it to the lower Court to work it out.] The principle to be applied is that the order of the Privy Council which reverses a judgment of the lower Court restores the success-

(1) 1 Suth. W. R. Mis. 1.
(2) 2 Suth. W. R. Mis. 21.
(3) 3 Suth. W. R. Mis. 21.
(4) 6 Suth. W. R. Mis. 26.
(5) 15 Suth. W. R. 335.
(6) 16 Suth. W. R. 303.
(7) 13 Moore's Ind. Ap. Ca. 490.
(8) 6 Suth. W. R. 109.

ful Appellant to the position he would have been in if he had been successful in the lower Court.

The cases established that the usage of the Sudder or High Court was to allow interest on costs, although such interest was not provided for in the decree, and that practice prevailed up to the case in the 6th volume of *Sutherland*. The decision in the 15th and 16th volumes follow the misapprehension which is observable in *Mosoodun Lall* v. *Bheekaree Singh* (1). Reference was then made to sect. 11 of Act XXIII. of 1861. [SIR JAMES W. COLVILE:—If the decree of the Court of first instance is reversed by the Court of Appeal with costs and interest, the Court does not direct that interest shall run from two different dates, viz., from date of decree in lower Court in respect of costs incurred in that Court, and from date of decree in appeal in respect of costs incurred on appeal. SIR MONTAGUE E. SMITH:—The usage of the Courts should be uniform, and interest upon costs stands on no different footing from interest on principal debt.]

Mayne, for the Respondent, contended that the Court below had no jurisdiction to grant the interest claimed on the other side. If it had jurisdiction, then the granting or refusing interest was a matter of discretion, and its exercise of that discretion in this case was right, and at all events will not be reviewed on appeal. The Chief Court could not exceed the terms of the order of the 5th of February, 1873. From the year 1866 one Indian Court could not, in dealing with the decree of another Indian Court, add interest not provided for in the decree. The reason for this is well given in *Kuppa Ayyar* v. *Venkataramana Ayyar* (2). See, also, sect. 10 of Act XXIII. of 1861. Though the case in the 6th volume of *Sutherland* is one of mesne profits, the judgment applies equally to cases of interest. See also *Sadisiva Pillai* v. *Ramalinga Pillai* (3), which refers to the Full Bench case in 6 *Suth.* W. R., and treats it as the foundation of a series of decisions excluding the power of the Court to award interest in executing decrees. The case cited on the other side from the 13th *Moore* is to be distinguished. There

(1) 6 Suth. W. R. Mis. 109.
(2) 3 Madras, H. C. 421.
(3) Law Rep. 2 Ind. Ap. 219; 15 Beng. L. R. 383.

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was a direction to the Lower Court to do whatever it thought fit. The order should have been read as if it directed mesne profits. There was no difference between the decree of the Indian Court and the order of Her Majesty. See *Lekraj Roy* v. *Mahtab Chand* (1) and *Bhoza Rughbur Singh and Others* v. *Bhoza Raj Singh and Others* (2).

Assuming, however, that interest could have been granted, it would be unreasonable that it should run from the date which the Appellant suggests. Under 1 & 2 Vict. c. 110, s. 17, interest will run on costs forming part of the judgment, as well as upon the debt, but only from the date of entering up judgment: *Pitcher* v. *Roberts* (3). Entering up judgment is completed from the date of signing judgment in the Master's book, not from entering up of record before costs are taxed, because the Defendant may make a tender. See judgment of *Tindal*, C.J., in *Fisher* v. *Dudding* (4). The principle is that interest runs from the time when there is a debt: *Newton* v. *Great Junction Railway Company* (5). There is no precedent to the contrary. A refund does not carry interest: see *Rodger* v. *The Comptoir D'Escompte de Paris* (6).

In cross appeal it was contended that so much of the decree appealed from should be reversed as directed the Respondent to pay Rs.1273, part of Rs.3273 allowed for the Appellant's costs in the Zillah Court in 1849; and also the sum of Rs.1014 allowed as refund of costs paid by Appellants to Respondents in respect of the Zillah Court's costs in 1849. The Court had no jurisdiction over these costs, and they had been refused by a Court of competent jurisdiction. Moreover, they were barred by lapse of time. See *Punjab* Code, Part II., sect. v., clauses 1, 2, where one year is prescribed; Act XIV. of 1859, where three years are prescribed. See *Kristo Kinkur Roy* v. *Rajah Burroda Kant Roy* (7) and a Full Bench ruling in *Anundmoyee Dassee* v. *Poornochunder Raj* (8). [SIR MONTAGUE E. SMITH:—"If the lower Court gives

(1) 21 Suth. W. R. 147.
(2) 3 N. W. P. 319 (1871).
(3) 2 Dowl. (N.S.) 394.
(4) 3 Man. & G. 238.
(5) 16 M. & W. 139.
(6) 7 Moo. P. C. (N.S.) 314; Law Rep. 3 P. C. 465.
(7) 14 Moore's Ind. Ap. Ca. 465; 10 Beng. L. R. 101; 17 Suth. W. R. 292.
(8) 6 Suth. W. R. Misc. Rul. 69.

such decree as Her Majesty directs time will run from the date of that decree. SIR BARNES PEACOCK:—See *Macpherson's* Practice of Privy Council [2nd Ed.] p. 149, 151.]

Leith, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

These appeals arise out of proceedings taken in the Chief Court of the *Punjab* to give effect to an Order of Her Majesty in Council made on the 5th day of February, 1873. That order was designed to determine finally a litigation which had subsisted for a great many years, first, between the committee of the late Mr. *Dyce Sombre*, and, after the death of that gentleman, between his representatives and the Government of *India*, touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the Begum *Sumroo*. It was a peculiar order, because, after reversing the decisions of the Indian Courts, declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the Defendants to the Plaintiffs, it proceeded, with the consent of the counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in *India* except the final direction as to costs, which was, "that the costs of the Appellants in the Chief Court of the *Punjab*, and in the Court of the Commissioner at *Hissar* and in the Court of the Deputy Commissioner of *Delhi*, be taxed and ascertained by the proper officers of those Courts respectively, and that the amount of the costs of the Appellants in all the Courts in *India* be paid to the Appellants in *India* by the Respondent."

After various proceedings had in the Chief Court of the *Punjab* the order under appeal was made. The following are the material passages in it: "The costs taxed and ascertained to have been incurred in *India* by the Plaintiffs, Appellants, which shall be payable by the Defendant, Respondent, amount as per memorandum at foot to Rs.12,354 12*a*., but no interest is allowed on

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such costs." And, "The Court further orders and decrees that the Defendant shall refund to the Plaintiffs the sum of Rs.1014, with interest thereon, from the 11th of September, 1849, to date of payment, at the rate of 12 per cent. per annum, and a further sum of Rs.5309, with interest thereon, from the 4th of August, 1865, to date of payment, at the rate of 12 per cent. per annum."

Against this order the appeal and the cross appeal have been brought. The appeal of the Plaintiffs is in effect that interest ought to have been allowed upon the Rs.12,354 12*a.* in a certain way. The Judges of the Chief Court of the *Punjab* had held that, in executing the order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs; and it may further be observed that the mode in which the Plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the gross principal amount of the Plaintiffs' costs, viz., the Rs.12,354 12*a.*, divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which it represented had been incurred. So far as their Lordships are aware, there is no instance of such a course having been adopted, certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The committee that made the report to Her Majesty upon which the Order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the lower Courts, would of course have been competent to do so; but that a subordinate Court executing an Order in Council which is silent upon interest, is at liberty to interpolate such a very special direction into that order is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the *Punjab* is right in its conclusion; that where the Order in Council is silent as to interest upon the

costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned counsel for the Appellants relied upon what they said had been the course of practice in *India*. In determining what is the existing practice in *India*, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in *India*. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII. of 1861. The words of the 10th section are, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned counsel for the Plaintiffs, however, relied on certain decisions of the High Court of *Bengal*, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII. of 1861 are the other way. It is sufficient to mention the case reported in the 6th *Weekly Reporter* at page 109, which was a decision of the Full Bench of the High Court of *Bengal*; and that before Mr. Justice *Bittleston*, which is reported in the 3rd *Madras* High Court Reports, page 421. Those cases seem to have established as to decrees of Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between these and

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costs, the case of *Rodger* v. *The Comptair d'Escompte de Paris* (1), is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of *India* and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an order of Her Majesty in Council has also been considered in the two cases cited from the *Weekly Reporter*, in which judgment was given by Mr. Justice *Mitter;* and it appears that as to Orders in Council, as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the Plaintiffs have failed to shew that the order made by the Chief Court of the *Punjab* is erroneous, in that it has refused to allow interest on the sum of Rs.12,354 12*a*.

Their Lordships have now to consider the cross appeal. The first point taken on that appeal is that the Defendants have been erroneously charged so much of the Rs.12,354 12*a*. as consists of costs which were incurred in the *Delhi* Court before Mr. *Gubbins*, and were dealt with by the Order in Council of the 3rd of February, 1858. Now, that prior Order in Council came about in this way: When the suit was first brought in the Zillah Court of *Delhi* by the committee of the lunatic, Mr. *Dyce Sombre*, Mr. *Gubbins*, the Judge of that Court, dismissed it on the ground that the claim was barred by the *Statute of Limitations*. His decision was confirmed on appeal by the Sudder Court of *Agra*. Against both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous; reversed them; and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the *Statute of Limitations*, should be paid by the Defendants to the Plaintiffs. That order for payment was never wholly carried out. It was partially carried out, because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of first

(1) 7 Moo. P. C. (N.S.) 331; Law Rep. 3 P. C. 465.

instance—the Court of Mr. *Gubbins*—do not appear to have been paid; and it is contended on the part of the Defendants now that those costs cannot properly be given as part of the costs payable under the Order in Council of 1873.

It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the *Punjab*, that the claim for these unpaid costs was barred by the *Statute of Limitations*, or the orders passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders, in such a proceeding as this, is very questionable; but it appears to their Lordships that those orders, taking them at their highest, could only bar the remedy given by the Order in Council of 1858 for the recovery of those costs; and that upon the true construction of the order of 1873, it was the intention of this Committee to give the Plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or in the Court of Mr. *Gubbins*. The ordering part of the Order in Council directs, not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the Appellants in all the Courts in *India* are to be paid to the Appellants in *India* by the Respondents; and the judgment of the Committee on which this order was drawn generally expresses that the Plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. *Plowden*, who appeared for the Defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs.12,354 12*a*. and paid by the Defendant to the Plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. *Plowden*; inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the Plaintiffs under the Order in Council of 1858.

Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the *Punjab* upon this point.

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The next question raised by the cross appeal was with reference to the refund of the sum of Rs.1014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed of with respect to part of the Rs.12,354; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. The Senior Judge of the Chief Court of the *Punjab*, says:—"The Court, referring to annexure D., has now before it a sealed copy of the order of Mr. *Gubbins*, dated the 11th of September, 1849, shewing that the sum of Rs.1014 was paid by the Plaintiffs for the Defendant's costs in that year;" and no suggestion that it had ever been refunded seems to have been made before him. As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the Order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. *Gubbins'* Court, cannot, for the reasons already given, be allowed to prevail.

Upon the question whether this sum, and the further sum of Rs.5309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord *Cairns'* judgment in *Rodgers* v. *The Comptoir d'Escompte de Paris* (1), because they find that in the proceedings of the Chief Court of the *Punjab* there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

It has, however, been admitted at the Bar, that there has been an error in the mode in which the interest on the Rs.5309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates.

(1) 7 Moo. P. C. (N.S.) 331; Law Rep. 3 P. C. 465.

It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

Their Lordships will therefore humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs.5309, to be computed and paid from the 4th of August, 1865, by directing that as to Rs.3159, part of the said sum of Rs.5309, such interest be computed and paid from the 27th of August, 1867; that as to Rs.1150, other part of the said sum, such interest be computed and paid from the 27th of August, 1867; and that as to the further sum of Rs.1000, being the remainder of the said sum, such interest be computed and paid from the 4th of August, 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.

Solicitor for the Appellant: *T. L. Wilson.*

Solicitors for the Respondent: *Lawford & Waterhouse.*

SHEO SOONDARY . . . . . DEFENDANT;

AND

PIRTHEE SINGH AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Hindu Law—Dayabhaga—Succession of Half-Brother in a Joint Family.

According to the Dayabhaga a brother of the whole blood in a joint family succeeds in preference to a brother of the half-blood to the share of a deceased brother.

Rajkishore Lahoory v. *Gobind Chunder Lahoory* (1) approved.

APPEAL from a decision of a Divisional Bench of the High Court (Feb. 13, 1875), which was passed after a remand by an

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) I. L. R. 1 Cal. 27; 24 Suth. W. R. 234; and note *infra*, p. 153.

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order of Her Majesty in Council, dated the 20th of November, 1873, to try certain issues. By that decision the High Court awarded to the Respondent *Pirthee Singh* one-third share of the estate in dispute, or, as it was expressed, a six annas and eight gundas share. Since that decision a Full Bench of the High Court in the case of *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1) held that brothers of the half-blood are not according to Hindu law as prevalent in *Bengal* entitled to succeed to the inheritance whilst there are brothers of the whole blood. Applying that principle, which the Appellant maintained to be correct, to the facts of this case, it was contended that *Pirthee Singh* was only entitled to two annas, thirteen gundas, one cowrie, and one krant share of the estate in question.

The facts of the case and the proceedings in the suit are sufficiently set forth in the judgment of their Lordships.

Cowie, Q.C., and *Graham*, for the Appellant, contended that the above decision of the Full Bench of the High Court was right. Three cases were referred to in which the equal heritable right of the brothers of the half-blood with those of the whole blood, whilst the family remained undivided, were upheld: see *Tilluk Chunder Roy* v. *Ram Luckhee Dossee* (2); *Kylash Chunder Sircar* v. *Gooroo Churn Sircar* (3); *Shib Narain Bose* v. *Ram Nidhee Bhose* (4). But the point was referred to a decision of the Full Bench by *L. Jackson* and *M'Donnell*, JJ., in the case of *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1), and in the judgment there given the authorities, see especially Dayabhaga, ch. xi., ss. 6, 8, 9, 10, were fully discussed. It was now contended that that decision was right, for the reasons therein given.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The single question in this appeal is whether in a joint family a

(1) I. L. R. 1 Calc. 27; 24 Suth. W. R. 234; and note *infra*, p. 153.
(2) 2 Suth. W. R. 41.
(3) 3 Suth. W. R. 43.
(4) 9 Suth. W. R. 87.

brother of the half-blood is entitled to succeed equally with a brother of the whole blood to the share of a deceased brother. It arises at the close of a long litigation, and in consequence of a remand which was made by Her Majesty, upon the recommendation of this Committee, on the hearing of a former appeal in this suit. It is not necessary to recount at any length the proceedings in the suit, because the determination of the above question will support either the decree of the subordinate Judge or the decree of the High Court which reversed that decision; but it may be stated that the action was brought by the present Respondent, *Pirthee Singh*, against the Court of Wards, who were representing *Sheo Shoondary*, to recover an estate called talook *Sunkra* in zillah *Bhaugulpore*. The estate had belonged to *Soomaer Singh*, the common ancestor of the Plaintiff and *Sheo Soondary*, and on the original hearing of the suit in *India*, and upon the former appeal here it appeared that two only of his descendants were before the Court, namely, the Plaintiff and the Defendant. *Pirthee Singh* was one of the sons of *Soomaer*, and *Sheo Soondary* was a granddaughter of *Manick*, another son. *Manick* left an only son of the name of *Durbijoy* and he had died leaving his daughter, *Sheo Soondary*, as his heir and representative.

The questions originally contested in the suit were whether *Pirthee Singh* was the legitimate or illegitimate son of *Soomaer Singh*, and an issue was directed to try that question. The other question was one of law, whether the law of primogeniture obtained in the family of *Soomaer Singh* or not. Those were the two questions upon the former appeal. It became, however, necessary to ascertain whether the family were governed by the law of the Mitakshara or by the law of the Dayabhaga, and how that was remained uncertain upon the record as it was brought up before this Committee. The result of the appeal was that their Lordships recommended that the cause should be remanded to try the following issues: "First, whether *Soomaer Singh* left any and what legitimate sons other than *Manick Singh* in the pleadings mentioned and the Respondent; and, if so, whether they are living or dead? And if any of them are dead, when they respectively died, and whether they left any and what male descendants." That issue was sent down, because upon the hear-

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ing of the appeal it appeared that there were other sons of *Soomaer* besides those who were the parties to the record, and their Lordships felt that it would not be right to give a decision disposing of this property without some inquiry being made respecting the other sons. The facts which appeared upon the trial of this issue have led to the question which is now before their Lordships for decision. The second issue was, "Whether the estate of *Soomaer Sing*, which was formerly within the limits of zillah *Beerbhoom*, having been transferred to zillah *Bhaugulpore*, the succession thereby becomes liable to be regulated by the law of the Mitakshara, or whether by reason of any local or family custom such succession, notwithstanding the transfer, continues to be governed by the law of the Dayabhaga." The finding of both the Courts upon that issue was that this family is governed by the law of the Dayabhaga.

Upon the trial of the first issue it appeared that *Soomaer* left six sons by three wives; *Manick*, the son of the eldest wife; four others, *Durbar*, *Tilluk*, *Hurry*, and *Ghansi*, sons by his second wife; the Plaintiff, *Pirthee Singh*, being the only son of the third. The question arose below whether *Pirthee Singh*, as a brother of the half-blood, succeeded equally with *Tilluk*, brother of the whole blood, to the shares of *Durbar*, *Ghansi*, and *Hurry*, who are dead. The subordinate Judge held that he did not so succeed; that he was only entitled to his own share as one of the six sons of *Soomaer*, and therefore to only one-sixth of the property. Upon an appeal to the High Court that decision, so far as it related to the share of *Pirthee Singh*, was reversed, and it was held that he was entitled altogether to six annas and eight pies share of this estate, made up of the shares to which they held him to be entitled as heir to his half-brother, and his own share.

Their Lordships have been referred to the Dayabhaga and the commentators upon the text of the Dayabhaga, and they have also been referred to a decision of the Full Bench of the High Court of *Bengal*, in which the question now to be determined was raised and very fully considered. That decision is opposed to the judgment of the High Court in the case under appeal; but at the time this judgment was given, the decision of the Full Bench had not been delivered, and the High Court appear to

have determined the question in this suit without going very fully into the doctrine. They probably acted upon certain decisions which have been given by Divisional Courts of the High Court of *Bengal*, which held that the half-brother was entitled to share in the same way as a uterine brother. The cases which have so held are *Tilluk Chunder Roy* v. *Ram Luckhee Dossee* (1), *Kylash Chunder Sircar* v. *Gooroo Churn Sircar* (2) (in which the Court went fully into the text-books and commentators), and *Shib Narain Bose* v. *Ram Nidhee Bose* (3). These decisions come near together in point of time. They are not decisions running over a long period of years, which might in that case be considered to have declared the law with regard to the succession to property, and which under such circumstances their Lordships would have been unwilling to disturb; but they are decisions of a recent date and coming very nearly together.

The recent case in which the question came before the full Court for consideration is *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (4). That case is entitled to great authority from the manner in which it came before the Court. The question is precisely that which is raised in the present appeal, and upon the hearing before the Divisional Bench, the Judges, upon being referred to the decisions in the Divisonal Courts on the subject, felt considerable doubt whether they had been correctly decided; and the question being one of great importance, they thought it right to refer the then appeal for decision to the full Court. That accordingly was done. Mr. Justice *Macpherson* gave the judgment of the Court, in which all the other Judges, being five in number, concurred.

It cannot be denied that the construction of the text in the Dayabhaga itself is not free from difficulty. In the early sections of the chapter in which it is discussed (the 11th chapter), the law appears to be laid down with tolerable clearness, that the half-brother does not succeed to the share of his half brother's estate in the case of an undivided family which has never separated. But in clause 35, a doubt is thrown upon the certainty of the

(1) 2 Suth. W. R. 41.
(2) 3 Suth. W. R. 43.
(3) 9 Suth. W. R. 87.
(4) I. L. R. 1 Calc. 27; 24 Suth. W. R. 234.

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doctrine thus laid down by a citation from Yama, which runs thus: "The whole of the undivided immoveable estate appertains to all the brethren; but divided immoveables must on no account be taken by the half-brother." This citation occurs in one of a series of paragraphs which discuss the effect of brothers becoming reunited after a separation; and it would appear that the law is different with regard to half-brothers who, having once separated, are re-united, from that which governs the case of half-brothers who have never separated.

Their Lordships do not think it necessary to discuss at length the different passages in the Dayabhaga and the commentaries of text writers upon them, because that has been done very fully in the able and well-considered judgment of the High Court delivered by Mr. Justice *Macpherson* (1). It is a question of positive law, and finding the law expounded, and, as their Lordships think, correctly declared by the High Court, it is sufficient to say on the present occasion that they adopt the opinion of the High Court and the grounds upon which their judgment is founded. There is no doubt that the brother of the whole blood stands with regard to religious offices in a higher position than the brother of the half-blood. The brother of the whole blood offers three oblations to the ancestors of the deceased on the father's side, and three on the mother's; whereas the brother of the half-blood offers three to the paternal ancestors only. Therefore, there are reasons peculiar to the Hindu law of succession, as expounded by the Dayabhaga, which may have led to the distinction in the mode in which the succession to brothers takes place. The High Court, having gone through the authorities, have declared what appears to them to be the result in the following sentences: "We thus have it that, (*a*) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother undoubtedly succeeds in preference to the half-brother: (*b*) In the Dayabhaga. ch. xi., s. 5, clauses 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood: (*c*) The son of a whole brother is expressly declared to rank

(1) See note on p. 153, *infra*.

before the son of a half-brother, and the principle upon which this is declared applies equally to the case of brothers and half-brothers: (*d*) When there has been a separation, a half-brother who becomes reunited gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the half-brother was inferior to that of the whole." This last proposition seems to be well founded on the authority of the Dayabhaga. Sect. 35, which embodies the passage from Yama, is referred to and explained in the judgment as follows: "It is to be observed, and I think it is shewn by clause 36 that this is so,—that in the Dayabhaga itself this text of Yama is introduced only as being connected with the matter under discussion, viz., the succession in cases of separation with or without reunion, &c., and there is really nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in clause 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of section 5." Their Lordships think that this construction reconciles the different parts of the Dayabhaga.

The result is that the judgment under appeal cannot be supported, and their Lordships will humbly advise Her Majesty to vary the decree of the High Court by declaring that *Pirthee Singh* is entitled to a sixth, that is to say, two annas and eight pies share of the estate instead of a six annas and eight gundas share. Inasmuch as the law had been declared in favour of the Respondent at the time the decree was passed, their Lordships think that it is not a case for costs.

Solicitors for the Appellant: *Lawford & Waterhouse.*
Solicitor for the Respondents: *T. L. Wilson.*

NOTE.—In the case of *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, which was heard on appeal by the High Court of *Bengal* (*L. Jackson* and *McDonnell*, JJ.), it was contended on behalf of the Defendant *Rajkishore*, that the Plaintiff was not entitled to the share of his deceased uterine brother, *Bhugwan Chunder*, to the exclusion of *Rajkishore*, the half-brother, as the family were

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undivided at the time of *Bugwan Chunder's* death. In consequence of conflicting authorities upon this point, the Division Bench referred, for the decision of a Full Bench, the question "Whether the Plaintiff is entitled solely to succeed to the share of his uterine brother; or whether *Rajkishore*, being a brother of the half-blood, should succeed jointly and equally with him."

The opinion of the Full Bench (*Macpherson*, Offic. C.J., *Jackson*, *Pontifex*, *Birch*, and *Morris*, JJ.) was delivered by Chief Justice *Macpherson* as follows:—

The answer to this question depends upon the construction to be put upon the Dayabhaga of *Jimutavahana*, the founder of the *Bengal* school. The other authorities current in *Bengal* are all of them based on the Dayabhaga, and such differences as exist between them and the Dayabhaga scarcely ever involve conflicts of principle. According to the Dayabhaga, the whole theory of inheritance is founded on the principle of spiritual benefit conferred, and it is by that principle that questions relating to inheritance must be tested and determined (see the judgment of the Full Bench in *Gura Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1)), the question now before us being no exception to this general rule.

It appears to me that the Dayabhaga (with the exception of one clause, chap. xi., s. 5, cl. 35, to which I shall presently refer at length), clearly shews that where there has been no separation uterine brothers take to the exclusion of half-brothers. The difficulty which has been felt has arisen out of this clause 35, and an erroneous idea that it and certain other propositions laid down as applicable to brothers in cases where there has been a partial partition, or a separation and subsequent reunion, are applicable to cases in which there has been no partition.

There is no possible question as to the superiority of the whole brother over the half-brother as regards conferring spiritual benefits. For whereas the whole brother presents six oblations to the ancestors of the deceased (three on the father's side, and three on the mother's side), the half brother presents three only, viz., three on the father's side: see Dayabhaga, chap. xi., s. 5, cls. 3, 12. So far, therefore, as concerns the principle which is the foundation of the whole law of inheritance in *Bengal*, the brother of the whole blood must inherit in preference to the brother of the half-blood.

The rights of brothers as regards succession are discussed and declared in the Dayabhaga, chap. xi., s. 5. Much that is to be found in this section is merely vague discussion. But it is generally easy to say what is authoritative, and what is not; and the whole section (excluding clause 35, which is reserved for special consideration) may be summed up thus:—Clauses 1 to 8 shew that, failing the mother, brothers inherit to the exclusion of brothers' sons (owing to the inferiority of the latter in the matter of oblations); in clauses 9, 11, and 12, it is laid down broadly that the brother of the whole blood takes before the brother of the half-blood—the latter being expressly placed (s. 12) between the whole brother and the nephew or brother's son; and the rest of the section, clauses 10 and 13 to 39 (with the possible exception of clause 35), are devoted to an argument as to what happens where there have been partition and reunion, whole or partial. From clause 13 to the end there is not a word (unless in clause 35)

(1) 5 Beng. L. R. 15; S. C. 13 Suth. W. R. F. B. 49.

which touches a simple case of succession where there never has been a partition at all. The conclusion arrived at as the result of the discussion as to what is to happen when there have been partition and subsequent reunion, &c., is, that if there has been a partition, and there are whole brothers and half-brothers, the whole brothers take alone if there has been no reunion; but a half-brother who has become reunited with the deceased will share equally with a whole brother of the deceased who has not become re-united. The reunion, in fact, is considered as advancing the half-brother to a position better than that which he would otherwise have occupied, the reunion being treated as equal to blood—a result which of itself shews that the original position of the half-brother was, according to Hindu law, inferior to that of the whole brother.

Besides the distinct declarations contained in this sect. 5, there are indications in other parts of the Dayabhaga of the writer's opinion that the brother of the whole blood was superior to him of the half-blood. For example, in chap. xi., s. 1, which treats of "the widow's right of succession," uterine brothers are mentioned in clauses 2 and 3 as near heirs; and in clause 17 a text of *Devala* is quoted, which expressly gives priority to the whole brother over the half-brother. The matter, then, under discussion is the position of the widow, and the brothers are only incidentally named. But in the discussion it never seems to have occurred to the commentator that there was anything unnatural or wrong in classing the half-brother separately from and after him of the whole blood; while in clauses 2 and 3 the use of the word "uterine" indicates the existence of some distinction between those who were uterine and those who were not. The Dayabhaga, chap. xi., s. 6, deals with the "nephews' right of succession." Here it is expressly and unequivocally laid down that the succession devolves, first, on the son of the whole brother, and if there be none, on the son of the half-brother. And the intelligible and natural reason given is, that the son of the half-brother, being a giver of oblations to the father of the late proprietor, together with his own grandmother (to the exclusion of the mother of the deceased proprietor), is inferior to the son of the whole brother, who gives oblations to the grandfather in conjunction with the mother of the deceased (clause 2).

We thus have it that—

(*a.*) Applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother undoubtedly succeeds in preference to the half-brother:

(*b.*) In the Dayabhaga, s. 5, cls. 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother, and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood:

(*c.*) The son of a whole brother is expressly declared to rank before the son of a half-brother; and the principle upon which this is declared applies equally to the case of brothers and half-brothers:

(*d.*) When there has been a separation, a half-brother who becomes reunited gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited, which proves that the original position of the half-brother was inferior to that of the whole.

There remains cl. 35, and the difficulties which it creates. After much discussion as to separation and reunion, &c., it is said in cl. 34: "Therefore, if

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whole brothers and half-brothers only (not reunited brothers of either description) be the claimants, the succession devolves exclusively on the whole brother. Accordingly *Vrihat Menu* says, 'If a son of the same mother survive, the son of her rival shall not take her wealth. This rule shall hold good in regard to the immoveable estate. But on failure of heirs, the half-brother may take the heritage.'" Then comes cl. 35, where, with reference to the declaration just quoted, "this rule shall hold good in regard to the immoveable estate," it is remarked: "This rule is relative to divided immoveables. For immediately after treating of such property, *Yama* says, 'The whole of the undivided immoveable estate appertains to all the brethren; but divided immoveables must on no account be taken by the half-brother.'" In cl. 36 the commentator proceeds to analyse this text of *Yama* thus: "'All the brethren,' whether of the whole or the half-blood. But among whole brothers, if one be reunited after separation, the estate belongs to him. If an unassociated whole brother and reunited half-brother exist, it devolves on both of them. If there be only half-brothers, &c." It is to be observed, and I think it is shewn by cl. 36 that this is so—that in the Dayabhaga itself this text of *Yama* is introduced only as being connected with the matter under discussion, viz., the succession in cases of separation with or without reunion, &c., and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in cl. 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of s. 5.

In the Dayatatwa of *Raghu Nandana* (written in the beginning of the 16th century) which is based on and closely follows the Dayabhaga, it is laid down expressly (ch. xi. cls. 29 and 30) that the brother of the whole blood takes before him of the half. The commentator then proceeds in cls. 31 to 56 to treat of what occurs in cases of partition and reunions, &c. In the course of this discussion he brings in the text of *Yama* (very much as it is brought in in the Dayabhaga) in connection with *Yajnavalkya's* observation (set out in cl. 32) that "1. A reunited brother shall keep the share of his co-heir who is deceased; or shall deliver it to his issue. But a uterine brother shall thus retain or deliver the allotment of his uterine brother. 2. A half-brother, however, being again associated, may take the heritage; not a half-brother (who is not reunited); or (a uterine brother) though not associated, may obtain the property, and not the son of a different mother who is reunited." Discussing this clause (which I give at length merely to shew how entirely it referred to cases of separation and reunion, &c.) in cls. 33 to 35, he, in cl. 36, says: "The passage 'but a uterine brother shall thus retain or deliver the allotment of his uterine brother' (sect. 32) is to be explained in the same way; then he continues in cl. 37: "On this a special rule is propounded by *Yama:* 'Undivided immoveable property goes to all (the brothers). But never should separated immoveable estate be taken by half-brothers.' 'All,' that is all the whole and half-brothers. The inference which is deduced from the sense of this text is that, exclusive of immoveable property, everything, whether divided or undivided, appertains to the uterine brother alone." Then cl. 38 deals with a question of reunion.

So that here, as in the Dayabhaga itself, the text of *Yama* is introduced only incidentally in the course of a discussion as to cases where there has been a separation, &c.

It is not easy now to interpret a text like this of *Yama* standing by itself and apart from the context in which it was originally placed by its author; what that context was we do not know. Very likely the text never was intended to mean more than that the estate of a father dying joint with his sons goes among all the sons equally, but that, after his death, on the death of a son the son's uterine brother succeeds in preference to his half-brother. It is impossible, however, to say for certain what the text meant.

It is quoted in *Colebrooke's* Digest, bk. v. chap. viii. s. 1, text 431. It is there treated, not as laying down any general rule as regards succession, but as applying only to cases where there has been a separation between the brothers, but part of the joint property has remained undivided. It is interpreted thus by *Jagannatha*:—"If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to divided property moveable or immoveable. The text of *Vrihat Menu* (that quoted in Dayabhaga, chap. xi. s. 5, cl. 34) likewise intimates the same by alluding to a distinction in respect of immoveable property when the subject proposed was already ascertained by the former part of the text, 428." The text referred to is as follows:—"If a brother by the same mother be living, one by a different mother shall not take the estate; the law is the same, even though it be immoveable property: but in failure of the whole blood, one of the half-blood may indeed possess the estate." It is to be noted further that this text from *Vrihat Menu* is also treated in *Colebrooke's* Digest as relating to the subject of succession in cases of separation, reunion, &c.

Although cl. 35, of s. 5 of chap. xi. of the Dayabhaga may in words appear to confine the rule as to the whole blood succeeding in preference to the half, to cases of succession "to divided immoveables" it is quite clear to me that the restriction thus put upon the rule was not intended to be general, but was confined to the branch of the subject under discussion, viz., cases where there had been separation, total or partial, and with or without reunion. Were I of a different opinion, I should still not be prepared simply on account of cl. 35, to restrict the rule as suggested: for so to restrict it is directly opposed to the main principle of the *Bengal* scheme of inheritance, and to the express declarations of the writer of the Dayabhaga himself, and of *Rughu Nandana*. *Yama*, moreover, is not a lawgiver of very special authority, though no doubt he is one of the early propounders of the law, whose rules are to be accepted where they are certain and intelligible, and not opposed to those laid down by other sages of equal or greater authority. As a matter of fact, the rule laid down in cl. 35. s. 5, chap. xi. of the Dayabhaga has never, so far as I can ascertain, been accepted (unless it can be said to be so accepted in the Dayatatwa) as laying down that, in the succession to an undivided estate, the whole brother does not take before the half, until the decision of Division Benches of this Court which have led to the present reference.

Srikrishna Tarkalankar (who lived about 1700, and whose opinion is entitled to very great respect) construed the Dayabhaga as laying down that the whole brother succeeded when there had been no partition, in preference to the half-brother: see his Recapitulations of the Order of Succession (*Stokes'* edition of the Dayabhaga, p. 352), when he sums up the law as laid down in the Dayabhaga,

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thus :—"If the mother be deceased, a brother is the successor. In the first place, the uterine or whole brother; if there be none a half-brother. But if the deceased lived in renewed coparcenary with a brother, then in case of all being of the same blood, the associated whole brother is heir in the first instance, but on failure of him the unassociated brother, so in the case of all being of the half blood, the associated half-brother inherits in the first place, and on failure of him the unassociated half-brother. But if there be an associated half-brother and an unassociated whole brother, then both are equal heirs."

The same view is propounded by him in his Dayakrama Sangraha, chap. vii. s. 7, cls. 1 to 6: and it seems clear that *Srikrishna* in laying down the law as he did had no intention of departing in any way from the Dayabhaga.

To turn to more recent writers on the subject. In *Halhed's* Gentoo Laws, published in 1776, *Srikrishna* is followed implicitly. I do not refer to *Halhed's* treatise as deeming it of much authority, but merely as shewing what was, in fact, supposed to be the construction of the Hindu law on the question now before us.

Sir *Francis Macnaghten*, in his Considerations of the Hindu Law, published in 1824 (pp. 111, &c.), also follows *Srikrishna*. Referring to the question of separation and reunion, and the confusion existing in the texts on the subject, he remarks that it is certain that if all continue joint from the beginning, or if all are in an actual state of separation, or if all return to union after having once been separated, the uterine excludes the half-brother from the succession.

So Sir *William Macnaghten* in his Hindu Law (ed. 1828, vol. i. p. 26) lays it down quite distinctly that "after the mother, brothers inherit; first the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half-blood; and fourthly, the unassociated brethren of the half-blood . . . ."

Elberling adopts the same opinion (par. 175, p. 78).

In the second volume of *Macnaghten*, at page 66, there is a case which has been referred to as contradicting *Macnaghten's* own text. But so far as concerns the first of the two questions, which are supposed to be dealt with in that case, it turns upon a wholly different point, viz., that when the first of the three brothers (one of whom was of the half-blood) died, his share went by survivorship to the other brothers, to the exclusion of his widow. This shews that the case must have been one under the Mitakshara law: and *Baboo Shama Churn Sircar* (Vyavastha Darpana, p. 1058, note), says it was an up-country case. The second question put does seem to involve the issue as to the superiority or equality of whole and half-blood among brothers. But the answer given is so loose, and so little in reply to the question asked, that but little value can be attached to it. The case stated is that the first son who died left a widow and a uterine brother. The reply assumes that he died leaving no widow.

The table of inheritance and succession published some five-and-twenty years ago by the late *Baboo Prosonno Coomar Tagore*, purports to be framed in accordance with the Dayabhaga, Dayatatwa, Dayakrama Sangraha, and other works of the *Bengal* school. In this table precedence is given to the brother of the whole blood, who stands No. 10 in the list of heirs, while the half-brother stands as No. 11. In the foot-notes to the table it is stated that the brother of the whole blood succeeds first. Then, in continuation of a *resumé* of the law of succession,

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when there had been separation and reunion, &c., there is this note, "The undivided immoveable estate on the death of the owner will be equally divided among the whole and half-brothers." This note may be said to throw some doubt on the table. But it is clear to me that *Prosonno Coomar Tagore* would never have framed the table as he did (and reproduced it, in pamphlet shape in 1868) if he had not intended the rule given in his note to be construed in a limited sense, as restricted to cases of succession to a portion of the joint estate which on a partial partition had remained undivided.

In the Vayavastha Darpana of *Baboo Shama Churn Sircar*, preference is given to the whole blood. The text of *Yama* is translated thus:—Whatever immoveable property may remain undivided, that appertains to all: but the divided immoveables must on no account be taken by the half-brother," and a distinct opinion is expressed that this is the real meaning of the text; in fact, that it must be read as suggested in *Colebrooke's* Digest, and that it does not apply to ordinary cases of succession amongst brothers who have never separated at all (Vayavastha Darpana, pp. 203, 204, and p. 1057, note.)

No cases have been cited to us in which the question has been judicially decided, except those which are mentioned in the order of reference.

On the whole I am of opinion that in *Bengal* the brother of the whole blood succeeds, in the case of an undivided estate, in preference to a brother of the half-blood.

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RAJAH PARICHAT . . . . . DEFENDANT;

AND

ZALIM SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSION, CENTRAL PROVINCES.

Mitakshara Law—Illegitimate Son—Maintenance—Power of Father to alienate Ancestral Immoveables.

The illegitimate son of a Hindu belonging to one of the twice-born classes has a right to maintenance; and an assignment to him by his father before the birth of a legitimate son and heir of ancestral immoveable estate for that purpose is valid.

Quære, whether, under the Mitakshara law, a father who has no legitimate son is competent to alienate the whole or part of his ancestral estate to a stranger.

APPEAL from so much of a decree of the Judicial Commissioner of the Central Provinces, made at *Nagpur* on the 24th of March, 1874 (on a special appeal preferred by the now Respondent

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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against a decree of the Commissioner of the *Jubbulpore* Division, dated the 18th of August, 1873, which affirmed the decision of the Deputy Commissioner of *Sagur*, dated the 14th of June, 1873), as granted to the Respondent possession of a village claimed by him.

The suit was brought by the Respondent to obtain from the Appellant possession of mouzah *Simeeria*, which he alleged had been granted to him for his maintenance by Rajah *Bahadoor Singh* in 1847, and from which he alleged that the Appellant, who had succeeded that Rajah on his death, had forcibly ousted him in July, 1872.

The Assistant Commissioner held that although the Respondent had had the village assigned to him for his maintenance as the illegitimate son of the Rajah, he had improperly mortgaged it to a stranger, and that therefore the Appellant, the legitimate son of the Rajah, was entitled to oust him; but while refusing to give a decree for possession of the village, he decreed that the Appellant should pay to the Respondent a yearly maintenance of Rs.680, a judgment which the Commissioner's decree affirmed.

The Judicial Commissioner, however, when the Appellant preferred a special appeal to him, was of opinion that it was not competent to the Court to allot pecuniary maintenance, and reversed the decrees; but being of opinion that the mortgaging of the estate by the Respondent was no excuse for the Appellant's taking the village, he gave to the Respondent a decreee for possession; and that portion of the decree it was now sought to reverse.

The facts of the case and the proceedings in the suit sufficiently appear in the judgment of their Lordships.

Cowie, Q.C., and *Graham*, for the Appellant, contended that Rajah *Bahadoor Singh* had no power to alienate the property in question, as he is alleged to have done by the sunnud.

The Judicial Commissioner had no jurisdiction in the absence of a cross appeal on the part of the Respondent, or objection taken by him to the finding of the Lower Court, to make in favour of the Respondent a decree at variance with the decree specially appealed against. He should have dismissed the suit with costs, the facts and the law not entitling the Respondent to a decree

upon the grounds relied upon by the lower Court or by himself. As to the general question of the right of an illegitimate son to maintenance: see *Chuoturya Rim Murdum Syn* v. *Sahub Purkulad Syn* (1). With regard to the legality of the alienation under Mitakshara law by a father of ancestral immoveable estates so as to bind his sons, existing or unborn, see *Rajah Ram Tewary* v. *Luchmun Pershad* (2), in which case Sir *Barnes Peacock* delivered the judgment of a Full Bench of the High Court. See also the authorities there cited, especially Mitakshara, c. 1, sec. 1; see further *Modhoo Dyal Singh* v. *Golbur Singh* (3). Under Mitakshara law the son is a joint owner with his father of the ancestral immoveable estate, and can avoid alienation thereof made without necessity before or after his birth. Otherwise consent thereto is necessary to its validity as against him. They then referred to *Muttusawmy Jagavera* v. *Vencataswara Yettarya* (4). Then, as regards such alienation for the particular purpose of providing maintenance for an illegitimate son, it must be found that such maintenance is reasonable in amount; further, it can only be justified by necessity; and where there is evidence of the existence of other property there cannot be a right to charge the zemindary proper. At all events no authority is proved to have arisen to render a specific alienation in perpetuity of this zemindary to make provision for such maintenance.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal from an order made by the Judicial Commissioner of the Central Provinces whereby he has decreed to the Respondent, the Plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called *Simeeria*. The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the Appellant, the late Rajah *Bahadoor Singh*, was the owner of an estate consisting of five villages, one of which was this village of *Simeeria*. They had

(1) 7 Moore's Ind. Ap. Ca. 18, 50.
(2) 8 Suth. W. R. 15.
(3) 9 Suth. W. R. 511.
(4) 12 Moore's Ind. Ap. Ca. 203, 220.

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been held by his ancestors for a long time, but there seems to have been some doubt to what extent they were rent free, though enjoyed by him as such. Ultimately, however, the Government of the North-Western Provinces determined to recognise the right of the Rajah and his heirs to hold them in perpetuity as rent-free. Before that question which is not material to the decision of the present appeal) was settled, the Rajah, having then no legitimate son, but having an illegitimate son, the Plaintiff, *Zalim Singh*, executed a sunnud, which, with the addition of certain names and titles of the parties here omitted, is in these words:—"This sunnud is granted by Rajah *Bahadoor* in favour of you *Zalim Singh* pledging to you the possession of mouzah *Simeeria*, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, Pan, Masala. You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and *Zalim Singh* was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the Appellant, the legitimate son and heir of the Rajah, by the Court of Wards. The Appellant, however, on coming of age appears to have ejected *Zalim Singh* from the possession of the village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the sunnud"; and the statement of his pleaders, who were examined in the cause, contains the following passage: "It is true that the proprietary rights of this village with others belonging to the jaghire were given at the settlement to *Parichat* (the Appellant) as head of the family; this *Zalim Singh* does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement *Zalim Singh* did not claim proprietary rights, they said, "*Zalim Singh* only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In these circumstances their Lordships do not deem it

necessary on this appeal to consider whether upon the true construction of the sunnud it was such a grant in favour of *Zalim Singh* as would enure for the benefit of his children, if he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of *Zalim Singh* to the present possession of the village.

The course the litigation took was as follows: The right of Rajah *Bahadoor Singh* to make such a grant was contested. That issue was found in favour of the Plaintiff and against the Defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy Commissioner confirmed by that of the Commissioner in favour of the Plaintiff. It came out, however, before the Deputy Commissioner that after *Zalim Singh* had been ejected from the possession of the village he had executed a mortgage of it in favour of some money lender; and thereupon the Deputy Commissioner came to the conclusion that the Plaintiff was no longer entitled to hold the village in khas possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of Rs.680. And he made a decree accordingly, which on the appeal of the Defendant was confirmed by the Commissioner. *Zalim Singh* did not appear in the Commissioner's Court or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy Commissioner. In that state of things the Defendant, the present Appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says: "The Lower Courts are wrong in law in holding that Rajah *Bahadoor Singh* had power to alienate ancestral immoveable property in the way he is alleged to have done

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by the sunnud put forward by the Plaintiff." In the fifth he says: "The Lower Courts are wrong in law in decreeing maintenance in Plaintiff's favour, notwithstanding that his plaint was simply for possession of the village of *Simeeria*, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the Lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possession. His decree, which is that now appealed from, is: "That the decrees of both the Lower Courts be reversed, and a decree granted for possession of mouzah *Simeeria* to Plaintiff, special Respondent with costs.

It has been argued that to make this decree upon a special appeal was *extra vires* of the Judicial Commissioner, the Courts below having decided against the Plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships that the Appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question whether, under the Mitakshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitakshara as to render such an alienation unlawful. When that question

does come distinctly before them it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes—and the Rajah may be assumed to fall within that category—has a right of maintenance. Therefore, in assigning maintenance to *Zalim Singh*, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitakshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah *Bahadoor* had power to make it, the concurrent decisions of the three Courts in *India* were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right and ought to be affirmed, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the Respondent has not appeared.

Solicitors for Appellant: *Watkins & Lattey.*

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MOHAMMED EWAZ AND ANOTHER . . . . PLAINTIFFS;

AND

BIRJ LALL AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

Registration—Effect of Certificate—Act VIII. of 1871, *s.* 35.

A deed of sale, purporting to have been made by a Mahomedan woman and her two sons, relating to their separate shares in certain immoveable property, was presented for registration; the two sons admitting the execution thereof by themselves, but denying that by their mother, and objecting to have it registered. The deed, however, was registered by the sub-registrar, but the High Court held improperly so, having regard to Act VIII. of 1871, s. 35, and that therefore the same could not be received in evidence against the sons:—

Held, that, according to the true construction of sect. 35, the registering officer must refuse to register a document *quoad* the persons denying the execution thereof, and *quoad* any person who appears to be a minor, an idiot, or a lunatic; but the section must not be extended so as to destroy the operation of a deed as regards those who admit the execution thereof, or who are under no disability.

A certificate of registration is sufficient to render a document admissible in evidence, without inquiry as to whether the same was properly granted.

Sah Mukhun Lall Panday v. *Sah Koondun Lall* (1) approved.

APPEAL from a decree of the High Court (March 16, 1875), reversing a decree of the Judge of *Bareilly* (August 4, 1874), which confirmed that of the Subordinate Judge of *Bareilly* (March 7, 1874).

The facts of the case are stated in the judgment of their Lordships.

The suit was instituted by *Shere Mahammed* and continued by his sons, the Appellants, after his death against the three vendors, *Mobaruk Jan* and her sons, and also the Respondents, who were subsequent purchasers of the same property, for completion of

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 2 Ind. Ap. 210.

the Plaintiffs' sale-deed, and recovery of possession of the whole interest of the three vendors. *Mobaruk Jan* and the Respondents appeared and denied the Plaintiffs' right to recover under the registration law, and on other grounds. The subordinate Judge decreed in favour of the Plaintiffs for completion of their deed as against the male vendors who had not appeared. The Judge dismissed the appeal, but the High Court held that the Plaintiffs' deed had not been registered in accordance with the Indian Registration Act of 1871, and was, therefore, inadmissible in evidence. It accordingly dismissed the suit.

Cowie, Q.C., and *Graham*, for the Appellants, contended that the sale-deed to *Shere Mahammed* having been admitted by the sons of *Mobaruk Jan*, and the same having been registered, it ought to have been held that the deed passed the title so far as regarded the shares of the sons as against all subsequent purchasers. Even if the sub-registrar had acted wrongly in registering, no irregularity in his procedure ought to deprive *Shere Mahammed* of his title as regards the shares of the sons. They referred to sects. 17, 23, 34, 35, 37, 38, 48, 49, and 71 of Act VIII. of 1871; also to *Futteh Chand Sahoo* v. *Leelumber Singh Doss* (1), which was decided under Act XX. of 1866, ss. 17 and 49, corresponding with the same section of Act VIII. of 1871; *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (2), in which sect. 88 of the Act there referred to corresponds with sect. 85 of the present Act. The effect of it is that a registration is not rendered null and void by reason of any defect of procedure on the part of the registering officer.

Doyne, for the Respondents, contended that the sale-deed of the Appellants was not registered in accordance with the provisions of sect. 35 of Act VIII. of 1871, and, therefore, under sect. 49, did not affect any of the properties comprised therein, and was not receivable in evidence. The policy of the Act was to check forgery and fraud. Any person who intends to rely on a conveyance must go before a registrar and have the issue tried whether

(1) 14 Moore's Ind. Ap. Ca. 129.
(2) Law Rep. 2 Ind. Ap. 210; 24 Suth. W. R. 75.

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the deed was really executed or not. He referred to sects. 17, 23, 32, 35, 37, 49, 58, and 60 of Act VIII. of 1871, and submitted that under none of the provisions of the Act does an instrument of sale required to be registered, and in fact duly registered, operate to divest, on registration, an estate which has previous to such registration passed to third parties, such as the Respondents in this case, under another instrument of sale duly executed and registered previous to the registration of the first instrument. The Respondents moreover were *bonâ fide* purchasers, without notice of the Appellants' claim. [SIR JAMES COLVILE:—You did not take that defence in the Courts below.] Irrespective of registration, the Appellants, who had not paid the consideration for the purchase, or obtained possession, had at most a right to recover damages from their vendors for a breach of contract, and acquired no vested estate as against subsequent purchasers *bonâ fide* and for consideration.

Cowie, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is a suit brought by the Appellants, the sons and heirs of *Shere Mahammed*, the vendee under a deed of sale which on the face of it purports to have been made by three persons, *Mobaruk Jan*, and her two sons, *Hyat Mohammed* and *Salamutoollah*. The sale was of certain shares in two mouzahs, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The Respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to *Shere Mahammed*, contend that the last-mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the Respondents who impeach that registration to shew the facts which invalidate it. They have not proved that the shares were held jointly, nor does

it appear that that point was made in either of the appeals below.

The subordinate Judge of *Bareilly*, and the Judge of *Bareilly* to whom the case went from the subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the subordinate Judge, which was affirmed by the Judge, in these terms: "That a decree be given to the Plaintiff for the completion of the sale deed dated the 14th of January, 1874, to the extent of the rights of *Hyat Mohammed* and *Salamutoollah*, Defendants, in the shares of mouzahs *Tah* and *Kishanpur Maupur* against the said Defendants and the vendees, and the claim for possession of the said shares, and for the rights of *Mussamut Mobaruk Jan*, be dismissed." That decree may be taken to be a declaration that the Appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of *Hyat Mohammed* and *Salamutoollah* in these mouzahs. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to *Shere Mahammed* was null, because the requisites of the *Registration Act* had not been complied with.

It appears that the deed was brought to the registrar on the 15th of January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, *Mussumat Mobaruk Jan*, by the hand of *Hyat Mohammed*. The sons admitted their own signatures and execution, but stated that their mother had not assented to the sale. The sub-registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on

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the 15th of January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of ten and eleven was presented for registration in the office of the officiating sub-registrar by *Chotelal*, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons, having attended on the following day, and made the admissions and statement above referred to, the sub-registrar made this endorsement: "*Hyat Mohammed* and *Salamutoollah*, sons of *Amirulla* (sect *Shaikh Punjabi*, occupation zemindary), and residents of *Pilibheet*, in the district of *Bareilly*, two of the three vendors named in this sale-deed, were identified," and so on, stating the identity, "and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale-deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale-deed drawn up without consulting their mother, and she was not a consenting party to it; that they had not received any money from this vendee, and they, having received a larger amount of consideration from *Byjnath*, &c., executed a sale-deed in their favour, and had it registered, and that they had no mind to have this sale-deed registered." The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document; but the Act gives power to the registrar to register, notwithstanding such a refusal, and accordingly the registrar did register the deed in the formal manner required by the Act, and made this formal endorsement of registration upon the instrument: "This document is registered at No. 40, p. 299, vol. xi., Register No. 1, on the 16th of January, 1874."

The deed of sale to the Respondents, which also bears date on the 14th of January, 1874, had been brought to the registry on the 15th; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the

Act a deed operates not from the time of its registration, but from the time when it would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it is immaterial that another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the mother, and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on the 35th section of the last Registration Act, Act VIII. of 1871. Before coming to that section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context by which to construe the language used in the 35th section.

The 17th section describes the documents required to be registered. The 23rd prescribes the times within which deeds are to be presented for registration, viz., a period of four months after their execution; and there is a proviso to that section to which it is material to call attention. It is this: "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors, may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th sections, which are the most important sections to be considered. The 34th enacts that, "Subject to the provisions contained in this part and in sects. 41, 43, 45, 69, 76, and 86, no document shall be registered under this Act unless the persons executing such document or their representatives, assigns, or agents authorized as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document—not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it. Then there is power to

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enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon inquire whether or not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear."

The 35th section is: "If all the persons executing the document"—again, not "purporting to execute it,"—but "if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sects. 58 to 61 inclusive." Then comes the enactment which occasions the difficulty: "If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document." These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons deny the execution. Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the

clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso in the 23rd section to which allusion has already been made, shews that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invalid, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him—to be minors, or idiots, or lunatics. Suppose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow, if the construction contended for by the Respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no disability. The consequences of such a construction would be so

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injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th section, and are of the most stringent description:— "No document required by section 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the *Registration Act*.

The Act gives little discretion to the sub-registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to inquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence, and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because, in point of fact, the sub-registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th section.

This point will of course dispose of the appeal. But there is

another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say, "It has been held by this Court more than once, that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may, in fact, have been improperly admitted to registration." Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed, to contend that there was an improper registration,—that the terms of the *Registration Act* in some substantial respects have not been complied with. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally, that all Courts, upon the production of a deed which has the registrar's indorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *primâ facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th section is, "After such of the provisions of sections 34, 35, 58, and 59, as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered,' together with the number and page of the book in which the document has been copied. Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been

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duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59, have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause, it is enacted, that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case, the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliunde;* but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. *Cowie* has referred: *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1); and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just adverted, were discussed in the judgment in this way: "Now, considering that the registration of all conveyances of immoveable property of the value of Rs.100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21, or 36, or other similar provisions." It may be observed, that section 36 in the former Act is the equivalent of section 35 in the present Act. "It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words, 'defect in procedure,' in section 88 of the Act,"—which is the same as section 85 in the present Act—"so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place

(1) Law Rep. 2 Ind. Ap. 210.

reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal, under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered, when some only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that "Index No. 1, shall contain the names and additions of all persons executing, and of all persons claiming under every document copied into or memorandum filed in book No. 1, or book No. 3." So that any one consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

On these grounds, their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of *Bareilly* to the High Court be dismissed, with costs, and that the last-mentioned decree be affirmed.

The Appellants will have the costs of this appeal.

Solicitors for the Appellant: *Watkins & Lattey.*
Solicitors for the Respondents: *W. & A. Ford.*

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THAKOOR HARDEO BUX . . . . . { ONE OF THE PLAINTIFFS ;

AND

THAKOOR JAWAHIR SINGH . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE COMMISSIONER OF SEETAPORE, IN OUDH.

Act 1 *of* 1869—*Hindu Joint Family—Registered Talukdar may be Trustee—Liability of Sunnud-holder to account—Act XXXII. of* 1871, *s.* 4.

In a suit brought by some members of a joint Hindu family for a declaration of right against another member thereof, alleging that the Defendant being kabooliatdar of a certain taluka in *Oudh* on behalf of the joint family, obtained a sunnud in his own name, and intended to deprive the Plaintiffs of their rights, notwithstanding an admission made by him that they were entitled to shares :—

Held, that a person who has been registered as a talukdar under Act I. of 1869, and has thereby acquired a talukdaree right in the whole property, may nevertheless have made himself trustee of a portion of the beneficial interest in lands comprised within the taluka for another and be liable to account accordingly.

Shunker Sahai v. *Rajah Kashi Pershad* (1) approved.

Case remanded accordingly to try whether notwithstanding the summary settlement, the sunnud, and the statute, the Plaintiffs or either of them had either before or after the passing of Act I. of 1869 acquired or become entitled to a beneficial interest in any part of the property.

Although the decision of the Commissioner in this case, affirming the decision of the settlement officer, was final under sect. 4 of Act XXXII. of 1871, the Commissioner's Court, being subordinate to that of the Judicial Commissioner, was not a Court of highest civil jurisdiction in the province within the meaning of Act II. of 1863, sect. 1.

APPEAL from a decree of the Commissioner of *Seetapore* (June 10, 1872), affirming a decree of the settlement officer of the district (Dec. 21, 1871).

The facts of the case and the proceedings in the suit are sufficiently set forth in the judgment of their Lordships.

Doyne, for the Respondent, at the hearing of the appeal, raised

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) See note (*a*), *post*, p. 198.

a preliminary objection whether this appeal from the order of the Commissioner was not admitted by the Commissioner without jurisdiction, having regard to Act XXXII. of 1871, s. 18, which declares the finality of the judgment of a Court of first appeal in the event of its confirming the original decision. Act II. of 1863 gives to the Court of "highest civil jurisdiction" in any province in *India* not subject to the general regulations, power to admit an appeal to the Privy Council. The *Privy Council Appeals Act* of 1874 substitutes the expression "Court of final appellate jurisdiction" for Court of "highest civil jurisdiction." It repealed Act II. of 1863, but came into force after the admission of the present appeal. He submitted that under sect. 4 of Act XXXII. of 1871 the Court of the Commissioner of *Seetapore*, being subordinate to that of the Judicial Commissioner, was not the "Court of highest civil jurisdiction," and therefore had no jurisdiction to admit the present appeal.

Leith, Q.C., contended that the Court which makes a final decree in any given case is the Court of highest civil jurisdiction within the meaning of Act II. of 1863. He referred also to the Act of 1871, s. 15, sub-s. 2.

THEIR LORDSHIPS in view of the objection raised considered that the Appellant should present a petition of special leave to appeal, which their Lordships would grant. But as the parties were ready with their arguments, the hearing would proceed *nunc pro tunc*.

Leith, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the *onus* was upon the Respondent to shew that any portion of the property in dispute was either his own or his father's separate acquisition. On the evidence the joint ownership of the whole by the family was established, and it was proved that the Appellant, and his co-Plaintiff, and also the descendants of a brother of the Plaintiff's father, as well as the Respondent, had shares therein. Moreover, there was evidence that since the grant of the sunnud to the Respondent he had waived any exclusive right which he

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might have had thereunder, and admitted the Appellant's right to a share in the ancestral villages at least. Moreover, the sunnud recognises the representative character of the grantee, and does not affect the rights which the law attaches thereto. They referred to Act I. of 1869, s. 3, and to *Mussamut Thukrain Sookraj* v. *The Government of India* (1); see Lord Justice *James'* judgment (2); see also *Hurpurshad* v. *Sheo Dyal* (3); "It can scarcely be supposed that the Governor-General intended to injure any member of this loyal family, and by confiscation and regrant to transfer the beneficial interest in the joint estates of the whole family from the several members of it to a single member of the family for his own sole benefit." In this case all the property is ancestral, with the exception of sixteen villages granted by Government, and with respect to those a question may arise whether it was a grant to the family or the individual. [SIR ROBERT P. COLLIER:—The only point actually decided in *Hurpurshad* v. *Sheo Dyal* is, that *Gouree Shunker* having the grant became sole owner by operation of the Act and transferred. SIR MONTAGUE E. SMITH:—The fact of his being sole owner is not inconsistent with his being trustee for others.] In this case the Respondent was selected by the other members of the family to act as trustee. Reference was then made to *Widow of Shunker Sahai* v. *Kashi Pershad*, July 29, 1873 (4).

Doyne, for the Respondent, contended that the Appellant had no right to the relief claimed against the sunnud-holder of the talook. The sunnud was to the Respondent and his heirs, and excluded any notion of an estate in the cousins, who are not recognised as heirs under Act I. of 1869. Under the terms of that Act the sunnud was a bar to such a claim as that made in this suit. The Act must be construed according to its strict terms. The Government had collected all the information they could before it was passed, and it had been under consideration for ten years. The policy of the Act was to enforce a policy of conquest and con-

(1) 14 Moore's Ind. Ap. Ca. 112.
(2) At p. 126.
(3) Law Rep. 3 Ind. App. 259; and at p. 269.
(4) See note (*a*), *post*, p. 198.

fiscation by the paramount power. It was not a case to be decided by considerations of justice and equity between the parties, but by reference to what the Government actually did, and the literal terms of the sunnud which they granted. If the Government did not intend to recognise the joint interests of the members of different families, but to create a territorial aristocracy by means of grants to individuals, it was in their power so to do, and such was the intention of the sunnuds and the policy of the Act. As for the cases in which the Privy Council has held that certain equities attached: *Mussamut Thukrain Sookraj* v. *The Government of India* (1) does not press the Respondent at all. There were no joint interests in that case, but two separate interests, and an express engagement had been entered into by the talukdar. [SIR MONTAGUE E. SMITH:—The effect of the Act is to give statutable force to the sunnud; it partly enlarges and partly restricts the rights thereunder, especially that of transfer. You must go the length of arguing that it excluded all trusts express or implied. SIR BARNES PEACOCK:—After confiscation, can there be an implied trust arising out of the regrant? SIR MONTAGUE E. SMITH:—Here, if anything, there is an express trust, see the settlement paper, and the case in 14th *Moore* recognises express trusts.] To make that case applicable, the circumstances of this case should be considerably changed. In *Hurpurshad* v. *Sheo Dyal* (2) all the lands in the kabulyat which were previously part of the family estate had been exempted from confiscation. [SIR JAMES W. COLVILE:—*Gouree Shunker* was held in that case to have constituted himself trustee for the others. SIR ROBERT P. COLLIER:—The judgment says in one part of it that *Gouree Shunker* took in consequence of the Act a permanent transferable estate, and that he afterwards transferred it; in another part it says that the grantee did not take to the exclusion of all loyal members. SIR BARNES PEACOCK:—That refers to *Chundun*, who though dead was named as grantee; but it was not intended to benefit *Gouree Shunker* alone. The observation applied, moreover, to lands exempted from confiscation. SIR MONTAGUE E. SMITH:—No doubt *Gouree Shunker* took the whole in one sense; he had the full

(1) 14 Moore's Ind. App. Ca. 112.
(2) Law Rep. 3 Ind. App. 259.

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legal title.] The simple question in this case is whether the Respondent had clothed himself with a trust, and if so whether effect can be given to it in this suit. He referred to *Widow of Shunker Sahai* v. *Kashi Pershad* (1).

Leith, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from a decree of the Commissioner of *Seetapore*, in *Oudh*, dated the 10th of June, 1872, affirming a decree of the Settlement Officer of that district, dated the 21st of December, 1871.

When the appeal was called on for hearing, Mr. *Doyne*, the learned counsel for the Respondent, took a preliminary objection, and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the *Oudh Civil Courts Act* (No. XXXII. of 1871), and to Act No. II. of 1863. By the 4th section of the former Act, five grades of Civil Courts in the province of *Oudh* were established, of which that of the Judicial Commissioner was the highest. By section 15, clause 3, of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by sect. 4 it was enacted that if the Court of first appeal confirms the decision of the Court of first instance, such decision shall be final.

By sect. 1 of Act II. of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the non-regulation provinces in *India*, the right of appeal was limited to final judgments, decrees, or orders, made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the Appellant that, as the judgment of the Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the province.

(1) See note (*a*), *post*, p. 198.

It should be remarked that, in the *Privy Council Appeals Act* of 1874, which was passed after the appeal in the present case was allowed, and which repealed Act No. II. of 1863, the words "Court of final appellate jurisdiction" are used in place of the words "Court of highest civil jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of highest civil jurisdiction in the province within the meaning of Act II. of 1863, notwithstanding the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of civil jurisdiction in the province—viz., to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of highest civil jurisdiction in any province," in Act II. of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of highest civil jurisdiction in the province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to a higher Court in the province, a Court of small causes would be equally a Court of highest civil jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the Appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by *Hardeo Bux*, the Appellant, and *Purbut Singh* against the present Respondent. *Purbut Singh* has not joined in this appeal.

The Plaintiffs in their plaint stated that during the king's time

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the talukas of *Bassaindeeh* and *Sijaolia* formed one taluka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned taluka *Sijaolia* from *Bassaindeeh;* that taluka *Bassaindeeh* formed the share of *Havanchal Singh*, father of *Hardeo Bux*, Plaintiff, *Fateh Singh*, father of *Purbut Singh*, Plaintiff, and *Bhawani Singh*, father of *Jawahar Singh*, the Defendant; that the Plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the Defendant treated them as his superiors, and never interfered in the affairs of the estate; that Defendant's father was junior, and was treated by the Plaintiffs' fathers as if he were their own son; that they (the Plaintiffs' fathers) got the kabooliat executed in his name with the view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said taluka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living together and their expenses paid out of the profits of the same estate; that the Plaintiffs had continued to enjoy the possession of the taluka while the Defendant had been the kabooliatdar; that as the Defendant was kabooliatdar the sunnud had been granted to him; that for one or two months the Defendant had, under the sunnud, given rise to enmity, and intended to dispossess them, and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right while the said sunnud did not contemplate to destroy the rights of the Plaintiffs; that in the arbitration case of *Bisheshar Bux and Ganga Bux*, talukdars of *Sorara*, the Defendant had, in his own deposition, stated that in case of his (Defendant's) brothers claiming their shares he would not decline to give them their shares; that the Defendant had altogether forgotten this written admission. Wherefore the Plaintiffs prayed that, after proper inquiry, orders be passed that they be not deprived of their right.

In their written statement, dated the 6th of October, 1865, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th of September, 1865, to give up possession,

but that previously to that time they had held continuous possession. They prayed that under the conditions laid down in the sunnud, in clause 2, Circular 2 of 1861, the Government of *India* letter No. 23, dated the 19th of October, 1859, and Circular No. 6 of the 19th of June, 1861, justice be done to them, and that they might not be deprived of their right.

The Defendant, in his written statement, alleged that the taluka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kabooliat; that he had held possession without any one as co-sharer; and that he of his own free will had been assisting his near relations with food, &c., without their having any right; and that a summary settlement had been made with, and a Government sunnud granted to him alone.

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the Defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the Defendant was protected by Act No. I. of 1869. He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the Plaintiff relating to another matter, the Financial Commissioner stated, "That the Defendant was protected by his sunnud; that the Plaintiffs could get nothing, and that it was perfectly useless their continuing litigation."

The Plaintiff *Hardeo Bux* appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. Subsequently, upon an application by the Plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council, the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on application from the Appellant for

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a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to talukas in *Oudh* previously taken by the Courts of the Financial and Judicial Commissioners; and, though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the Appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this order will be filed with the record."

The suit was commenced long before Act I. of 1869 was passed, viz., as far back as the 28th of August, 1865, but the judgment of the Settlement Officer, the Court of first instance, was not pronounced for upwards of six years afterwards. Some of the proceedings which were taken in the meantime are detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary."

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March, 1858, which declared that the proprietary right in the soil was confiscated to the British Government, which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th of October, 1859, set out in the 1st schedule to Act I. of 1869, it was declared that every talukdar, with whom a summary settlement had been made since the re-occupation of the province, has thereby acquired a permanent hereditary and transferable proprietary right in the taluka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka.

By sect. 3 the Governor-General in Council desired that the Chief Commisioner of *Oudh* should have ready a list of the

talukdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, viz., on the 24th of April, 1858, a summary settlement of the lands had been made with the Defendant. He was consequently included in the list of talukdars, and a sunnud was granted to him. After the passing of Act I. of 1869 he was also registered in List No. 1 under Act No. I. of 1869, sect. 8, and also in List No. 5 (*Oudh Government Gazette*, August 7th, 1869).

The order for the summary settlement with the Defendant was made by Colonel *Barrow*, the then Special Commissioner. The Defendant, in his application for the summary settlement, stated that he had no partner other than the Plaintiff *Hardeo Bux*.

On the 4th of April, 1866, pending the investigation of the case, the then officiating Settlement Officer, Mr. *Wood*, the Court of first instance, wrote to Colonel *Barrow*, the Commissioner of the *Lucknow* Division, a letter, of which the following is a copy:—

"Sir,—You doubtless recollect Thakoor *Jawahar Singh*, of *Bassadhee*, who was rewarded for his loyalty during the late disturbances.

"2. I find that you, as Special Revenue Commissioner, on reoccupation directed that the thakoor was to be admitted to engage for his taluka.

"3. In Statement A, the thakoor admitted to you that his cousin, *Hardeo Bux*, was his sole co-sharer. Notwithstanding this admission, you directed that settlement was to be made with *Jawahar Singh*. Do you recollect whether you intended such settlement with him alone, as Sadur Malgoozar, as a matter of convenience (1), and that *Hardeo Bux*, the acknowledged co-sharer, was to be recognised at this settlement according to the nature of the rights?

"4. An early answer will oblige."

To that letter Colonel *Barrow*, on the 8th of April, 1866, sent the following answer:—

"Sir,—Referring to your letter without No., dated the 4th instant, in the case of Thakoor *Jawahar Singh*, of *Bassadhee*, I

(1) Circular 6 of 1862, par. 6.

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have the honour to request you will be so good as to forward to me the summary settlement file with Special and Chief Commissioner's orders thereon, as it will enable me better to remember the circumstances, if I see what was written.

"2. It is within my recollection that settlement was made solely with *Jawahar Singh*, because he had given active assistance to Government in 1858."

Subsequently, on the 25th of September, 1866, Colonel *Barrow* wrote to the Settlement Officer as follows:—

"Sir,—I have now received the vernacular papers of the summary settlement of the estate of *Jawahar Singh*, of *Bassadhee*, and regret they do not afford much information.

"2. *Jawahar Singh* was one of those who early tendered allegiance after the rebellion, and afforded active assistance to the British Government. I have little doubt but that, in consequence of this, the estate was conferred on his name alone, and it was the meaning and intention of the settlement of 1858, not only to have but one head in each estate, but that those estates should remain for ever undivided. This latter condition, as you are aware, was departed from under the orders of the Governor-General making all estates heritable and transferable, under which order talukdars can now divide and will away their villages as they like. It is a question, though, whether any one can or not be admitted to share in a taluk.

"3. The policy of the summary settlement was to create and maintain large and undivided estates, a system, I believe myself, admirably suited to this country, but, as that is no longer possible, there can be no reason why sharers should be barred, and provision ought to have been made for their cases by those who departed from one of the principles of the settlement of 1858–59."

Upon the receipt of that letter, the Settlement Officer being, as he stated, at a loss how to proceed, recorded a memorandum dated the 23rd of October, 1866, and forwarded it on the same day to the Commissioner of the *Seetapore* Division for orders. The following is a copy of the memorandum:—

"At length I have received Colonel *Barrow's* reply to my letter of the 4th of April last. The delay arose from his not having

received the summary settlement file from the Financial Commissioner's office.

"As I am at a loss how to proceed with this case, I submit the proceedings for the orders of the Commissioner, as to whether such a claim is cognisable or not under existing circulars.

"I must state that, in the case marginally noted 1, it was proved beyond a doubt that a division of the lands was effected about twenty years prior to annexation, when four of the seven brothers held their share jointly in common, and three held their share in like manner. The Commissioner will see that the parties to the suit had lived together as an undivided family up to that year, when, through an incident (the Sadar Moonsiff's Report under Circular 37 of 1864), a dispute broke out, and Jawahir Singh struck off his connection with his cousins.

"I beg to refer the Commissioner to the vernacular papers filed by the Plaintiffs, including an attested copy of Jawahir Singh's statement as an assignee in the case marginally noted 2, wherein he admitted the Plaintiffs' right to separate their shares if they desired it.

"As I am seeking the Commissioner's instructions in the case, I withhold the expression of my opinion on the merits of the claim.

"October 25, 1865."

Three months after the date of the above letter the Commissioner sent to the Financial Commissioner in a letter dated the 22nd of January, 1866, as follows:—

"Sir,—I have the honour to submit for orders a letter, dated the 25th of October last, with enclosures, from the Officiating Settlement Officer, Sangor, forwarding the claim of Thakur Bux to a share of certain lands for which Jawahir Singh holds a sanad.

"2. Some of the villages held by Jawahir Singh under the sanad are khoosh, while others are those which have been granted to Jawahir Singh as proprietary rights, as are covered by the sanad. Jawahir Singh and his [illegible] Barrow, in the year of [illegible], [illegible]

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was his co-sharer. This admission was made on the summary settlement statement, and manifestly referred to the whole estate, and not, as *Jawahar Singh* now pleads, to a single village. Further, in the case of *Ganga Bux* and *Bisheshar Bux*, *Jawahar Singh* deposed, on the 7th of July, 1859, that it was the custom in his family to allow partition, if any sharer desired it, and several partitions were made prior to annexation, shewing that this has erroneously been considered a taluk.

"3. The Settlement Officer made a reference in this case to Colonel *Barrow* when Commissioner of *Lucknow* (*vide* his replies, No. 597 of the 6th of April, 1866, and No. 1913 of the 25th of September, 1866), which shew that *Jawahar Singh* has some special claims, as having been one of the first to tender his allegiance, and as having rendered active assistance to Government; but, as the settlement statement of April, 1858, contains a distinct admission by *Jawahar Singh* that *Hardeo Bux* was his co-sharer, the question arises (*vide* paragraph 6 of Settlement Circular, No. 6 of 1862) whether the settlement in the name of *Jawahar Singh* only, and a grant of a sunnud to him, bars the claim of *Hardeo Bux* to a share? I recollect that a case was referred to Government in 1862, in which it was held that a settlement had been made with a rannee as Saddar Malgoozar only, but the particulars may have differed in some respects."

To that letter the officiating Financial Commissioner, on the 26th of January in the same year, sent the following reply:—

"Sir,—In reply to your No. 31 of the 22nd instant, I have the honour to state that the proceedings shew that *Hardeo Bux* got maintenance in the *Nawabee;* but nothing on the record tends to distinctly prove *that he had proprietorship over any particular portion of this estate in the Nawabee*, but, at present, it will not be necessary to enter on the subject of what *Hardeo Bux* should get as a relative, the Chief Commissioner having under consideration new rules that will provide for talukdars' relatives who are barred by the sunnud. In the meantime, it would not, perhaps, be a bad plan to give the management of the villages—to the jamma of which *Jawahar Singh* objects—to *Hardeo Bux*, if he accepts the assignment, as he would appear to do.

"2. The general question between the two must remain pending in the Settlement Court until the issue of the new rules. All proceedings are, accordingly, returned."

In the succeeding April the Settlement Officer again applied for instructions, and the Financial Commissioner replied that "no orders could be passed until the measures then under consideration in regard to the claims of co-sharers in talukas should be completed."

In consequence of these orders the proceedings appear to have been suspended until the 13th of December, 1871, when the Plaintiffs presented a petition praying for final orders. In the meantime, Act I. of 1869 had been passed. The then Settlement Officer took up the case, and on the 21st of December, 1871, held, as before stated, that the Plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel *Barrow's* recollection to which he refers in his letter of the 6th of April, 1866. If any information from Colonel *Barrow* was considered necessary he ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th of September, 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel *Barrow* does not appear to have always entertained the opinion that the settlement was made with *Jawahar Singh* for his benefit alone, for in his Minute, dated the 11th of April, 1868, he says:—

"I have been much troubled by this case in many ways, and *Jawahar Singh*, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and *Hardeo Bux*. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to

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their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments, or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6, p. 39: "The Courts are open to all and must be guided by their own rules."

Colonel *Barrow* had no authority to stay until the issue of new rules the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer in his judgment treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I. of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I. of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the Plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I. of 1869?

In support of the appeal the case of *Thukrain Sookraj Koowar* v. *The Government and Others* (1) was referred to.

In that case the Plaintiff's husband, the younger branch of the great *Oudh* family of *Bhinga*, had up to the time of the annexation of *Oudh*, been in the undisturbed and absolute possession of an estate called *Deotaha*, which had been united in the time of the native Government with the large taluk of *Bhinga*, of which the Rajah of *Bhinga*, the representative of the elder branch of the family, was the talukdar, the Plaintiff's husband paying to the talukdar his proportion of the jumma assessed upon the whole taluka.

Upon the making of the summary settlement in 1858–59, after the suppression of the Mutiny, the Plaintiff was about to apply to the British Government for a summary settlement of the mehal which belonged to her husband, and which had descended to her.

(1) 14 Moore's Ind. App. Ca. 112.

She was, however, dissuaded by the Rajah of *Bhinga* from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave the protection of her interest to him, and pledged himself that her possession of the mehal should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire mehal of the Appellant as part of the one-half of his estates, and the Plaintiff's estate called *Deotaha* was taken by Government, and the greater part of it made over to *Oudh* loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th of October, 1859, constituted the talukdar the absolute owner of the whole estate, including the Appellant's estate, *Deotaha*, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice *James*, speaking of the Government letter of the 10th of October, 1859, said (1): "In English language it gave the registered talukdar the absolutely legal title as against the State and against adverse claimants to the talukdary; but it did not relieve the talukdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the Appellant was the acknowledged *cestui que trust* of the registered talukdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in *Oudh;* and that the cruel wrong of which this lady has been the victim is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the

(1) 14 Moore's Ind. App. Ca. at p. 127.

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equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under-proprietary right, being the interest to which the Appellant was entitled at the time of the annexation of *Oudh*, was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the talukdar prior to the summary settlement to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the talukdar prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the Plaintiff.

In the case of the widow of *Shunkur Sahai* v. *Rajah Kashi Pershad*, decided in the Privy Council the 29th of July, 1873 (1), there was also no written agreement signed by the talukdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of *Shunkur Sahai* was entitled as co-partner with Rajah *Kashi Pershad* to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as talukdar of twenty-six villages, including the seven in which the Plaintiff was interested. In his application for the settlement he stated that in 1264 Fuslee the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as talukdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. The sunnud of the talukdary, including the seven villages, was under the letter of the 10th of October, 1859, granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued for

(1) See note (*a*), *post*, p. 198.

proprietary and also for under-proprietary rights. It was held by the Court of first instance that her suit for the former was barred by the sunnud being in the name of Rajah *Kashi Pershad* only, and that she could not recover under-proprietary rights, because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was no ground for holding that the summary settlement and subsequent order of 1859 conferred talukdary rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the judgment, which does not appear to have been yet reported. They say:—

"The construction which their Lordships would put upon the words 'and that the name of *Shunkur Sahai's* widow be recorded as a shareholder' is not that the Settlement Officer gave or intended to give the widow the right of making a summary settlement as talukdar, but simply desired to place on record for her benefit her admitted beneficial interest in some, and some only, of the villages which made up the settled taluk. . . . .

"Mr. *Capper* seems to have admitted, as to the seven villages, that though the Appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the talukdar. Colonel *Barrow*, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed, and that, accordingly, the relation of trustee and *cestui que trust* having, so to speak, been established between them, she was entitled to one-third share of the profits of the

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villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a talukdar under Act I. of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly.

In that case the *cestui que trust* was a stranger. In this the Plaintiffs claimed as persons constituting with the Defendant a joint Hindu family.

It appears that the Respondent, in his application for a summary settlement in the case now under consideration, stated that there was no partner of his other than *Hardeo Bux*, but he said nothing as to *Purbut Singh*.

On the 22nd of March, 1866, the Plaintiff deposed that he, *Purbut Singh*, and the Respondent all lived together, *and had everything in common up to January then last*, which was nearly eight years after the date of the summary settlement, and more than six from the date of the sunnud.

Their Lordships are of opinion that up to the time of Lord *Canning's* proclamation the whole of the villages mentioned in the summary settlement were the joint family property of the Petitioner and *Purbut Singh* and the Defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The Defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th of July, 1859, that the custom prevailing in his family was that if his cousins, meaning the Plaintiff and *Purbut Singh*, who were his partners, should claim they could get their shares divided. He said, "They at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property, or whether the Defendant merely made an allowance to the Plaintiffs.

The Defendant, in his deposition, deposed that his statement

made at the time of the summary settlement referred to mouzah *Gungoa* only. But that seems to be at variance with the statement A, which refers to the eighty-two villages mentioned in column 3.

The Lower Courts appear to have decided the case merely upon the ground that the Defendant was protected by the sunnud, without adverting to sect. 15 of Act I. of 1869, or inquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the Plaintiffs or the Appellant had, either before or after the passing of Act I. of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The Defendant's sunnud is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or the property comprised in it before the registration of the Defendant under Act I. of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the Respondent has in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the Appellant and *Purbut Singh*, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue, as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

Agent for the Appellant: *T. L. Wilson.*
Agents for the Respondent: *Barrow & Barton.*

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WIDOW OF SHUNKER SAHAI v. RAJAH KASHI PERSHAD.

(*a*) The following decisions, which are frequently referred to in appeals from *Oudh*, and which were decided on July 29, 1873, but were not reported in *Moore's* Indian Appeals, are printed for convenience of reference.

WIDOW OF SHUNKER SAHAI ... ... PLAINTIFF;

AND

RAJAH KASHI PERSHAD ... ... DEFENDANT.

ON APPEAL FROM THE COURT OF THE FINANCIAL COMMISSIONER OF OUDH.*

In a suit against the Respondent pending the regular settlement of taluk *Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the taluk was composed; it appeared that the Respondent had before judgment obtained a sunnud of the whole taluk, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plaintiff as respects the said one-third share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages :—

Held (1), that the Plaintiff could not establish talukdary rights, for, having no interest in many of the villages, in order to make her a talukdar it would be necessary to reform the sunnud and break up the existing settlement and re-settle the estate in three different portions.

Quære, whether the sunnud could be reformed after Act I. of 1869, without a special Act of the Legislature.

(2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was sole hereditary proprietor of the taluk before the summary settlement, and whose rights were reserved under the Proclamation.

(3) The summary settlement not having been made with the Plaintiff *as talukdar*, neither it nor the order of 1859 conferred talukdary rights upon her.

Held, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages, and in a one-third share of the profits of the said seven villages, and to have a settlement of the four villages on terms of paying to the talukdar the Government demand *plus* 10 per cent.

Quære, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a talukdar, from the disabilities imposed upon her by the general law.

THE judgment of their Lordships (July 29, 1873) was as follows :—

The Respondent, the Talukdar of *Sessendee*, is one of the five loyal Talukdars who were excepted by name in Lord *Canning's* Proclamation of the 15th March, 1858, from the general sentence of confiscation thereby pronounced against the landholders of *Oudh*; and as such has had his name entered in the second

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. ASSESSOR: SIR LAWRENCE PEEL.

schedule annexed to the *Oudh Estates Act* (No. I. 1869), pursuant to the provisions of the 4th section of that statute. The questions raised by this appeal are, how far the rights of the Respondent are affected by the conflicting rights which the Appellant possesses in certain of the villages comprised in his taluk, and what effect can or ought now to be given to the latter as against him.

The family connection between the parties is of this kind: one *Imrit Loll* had three sons, *Koondun Loll*, *Mohun Loll*, and *Seetaram*. The pedigree in the case states that *Seetaram* left descendants, but that they have no interest in the property; and, however this may be in point of fact, *Seetaram* may, for the purposes of this appeal, be treated as having died childless. *Koondun Loll* died in 1838, leaving one son, *Shunker Sahai* (also deceased), of whom the Appellant is the widow, heiress, and representative. The other son, *Mohun Loll*, died in 1837, leaving a daughter, who is the wife of the Respondent.

The taluk came into this family by gift from one *Bussunt Koonwur*. The gift was made nominally to *Shunker Sahai*, but, as the Respondent alleges, really in favour of *Imrit Loll*. It is immaterial to consider how this was, because it is admitted on all hands that either by virtue of pre-existing family arrangements, or of the proceedings had since the annexation of *Oudh*, the Appellant can now only claim the whole proprietary right in four, and a one-third share in seven others of the twenty-six villages which compose the taluk; the full proprietary right in the remaining fifteen villages belonging to the Respondent.

The fiscal history of the taluk is thus given in the record:—"It is admitted that *Mohun Loll* died in 1243 F., *Koondun Loll* in 1244 F., *Shunker Pershad* in 1248 F.; that from 1243 F. to 1250 F. the engagements for the Government revenue of the taluk were taken from the widow of *Mohun Loll*, those from 1251 F. to 1256 F. from the widow of *Shunker Sahai*, those from 1257 F. to 1259 F. from the widow of *Mohun Loll*, and those from 1260 F. to 1263 F. from *Kashi Pershad*, who had married *Mohun Loll's* only daughter, the widows being both alive." Hence it appears that in 1856, when the annexation of *Oudh* took place, the Respondent was the ostensible talukdar, and he appears to have continued to be such at the date of Lord *Canning's* Proclamation.

The present litigation began in March, 1864, when the Appellant commenced proceedings against the Respondent in the Court of the revenue officer engaged in making the regular settlement. The record, which is in other respects but loosely made up, contains only the pleadings as to one of the seven villages; and therefore it does not clearly appear what was the precise case which she made in respect of the four villages of which she claimed to be sole proprietor. The nature of her claims touching all but the one village in question, is only to be gathered from the judgments afterwards to be considered, of which some appear to have dealt with her whole claim.

The plaint set forth in the record prays, "that the settlement of the proprietary and sub-proprietary rights to one-third share in the village may be made with Plaintiff, according to the provisions of sect. 167 of the directions to Settlement Officers, and of sect. 31 of Circular No. 2, and that the wajiboorlurz (written representation) may be recorded by the Petitioner." This prayer, whether it does or does not amount to a prayer for talukdary rights as such, when distinguished from ordinary zemindary rights, as understood in *Oudh*, unquestionably imports

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a claim for a direct settlement of the Appellant's share of the village with her, independently of any superior.

On the 16th of April, 1864, the Respondent put in a petition insisting on the absolute right conferred upon him by the Proclamation of March, 1858; and objecting to the Appellant being treated even as under-proprietor, as according to the settlement papers she does not possess these rights.

In answer to this the Appellant's agent, on the 11th of May, 1864, put in a petition in which he entered into the history of the taluk before the annexation of *Oudh;* insisted in paragraph 4 on the provisions made by the British Government for the protection and maintenance of the rights of persons in possession, and the rights and possession of under-proprietors; and after stating in paragraph 7, "That if in consideration of the estate having been formally gained by the husband of Petitioner's client who is in the possession of the same, she is entitled according to law to superior right, the objection of the Rajah's mookhtear to the settlement of under-proprietary right with her cannot be held valid;" he concluded with the expression of a hope that after due inquiry a decree for the possession of the entire estate of *Sessendee* might be passed in the Plaintiff's favour.

Mr. *Capper*, the Settlement Officer who tried the case in the first instance, came to the following conclusions:—

1st. That the Appellant's claim to the entire taluk as given to her late husband, was barred by the grant of the taluk by Government to the Respondent.

2ndly. That this did not affect her claim to hold *Pookhta* as under-proprietor, villages which were the proprietary of her husband, and which she was holding in 1855-1856 A.D.; as to which appropriate orders would be issued.

3rdly. That the claim to share in the proceeds of the joint collections of other villages in which she had no distinct proprietary possession in 1855-1856 was barred by the rules which admit no share in a taluk. And he added the following observations:—"The common collection must be held to be that of the talukdar, and any distribution of the proceeds must be held to be his voluntary act granting maintenance to his relations. By the local rules these can only be enforced when the talukdar has bound himself in writing to continue it. If such document exist, it can be separately adjudicated."

His final decree in the case of the particular village sued for by the Plaintiff, set out in the record, was in these words, "I dismiss the claim of the widow of *Shunker Sahai* to under-proprietary title in one-third of mouzah *Sessendee Khas*, and decree full under-proprietary title to Rajah *Kashi Pershad*."

On appeal this decree was confirmed by Mr. *Currie*, the Settlement Commissioner, on the 22nd of September, 1864. In his judgment he states that, although in the Lower Court the Appellant had claimed only one-third of mouzah *Sessendee* in under-proprietary right, she had before the Appellate Court laid claim to the whole; that he refused to admit an appeal for a larger portion than was claimed in the Lower Court; that her claim, such as it was, was barred by the Respondent's sunnud; that any possession which she may have had in the village was of a proprietary not of an under-proprietary character, and that possession of a proprietary character could not entitle a person to be recognised as an under-proprietor. He added that, inasmuch as the Respondent had voluntarily agreed to allow the Appellant to retain possession of her one-third of the profits for the

term of her life, the Settlement Officer, if she applied for the benefit of this concession, and gave security not to disturb the Respondent further, should take the necessary steps to secure her the rights conceded.

Their Lordships have to observe on this decision that the reasoning on which it is based applies only to the particular village of *Sessendee Khas*, and the other six in respect of which the Appellant claimed one-third of the profits. It has no application to the four villages of which she claimed the full proprietary right, and the record fails to shew distinctly what proceedings were had in respect of the latter after Mr. *Capper's* judgment of the 23rd of May, 1864.

From Mr. *Currie's* order the Appellant brought a special appeal before Mr. *Davies*, the Financial Commissioner, which that officer dismissed on the 6th of December, 1864, regretting that he was legally debarred from interfering with orders of the lower Courts. And on the 10th of July, 1865, he rejected a subsequent petition for review of judgment, stating that "he fully admitted the hardship of the case, but was unable to point out any legal remedy at present." The first of these orders may have been passed under some doubt as to the powers of the Financial Commissioner. But no such doubt can have existed in July, 1865, when the petition for review was rejected, since Act XVI. of 1865, which received the assent of the Governor-General on the 7th of April, 1865, had been passed intermediately to remove such doubts. On the 18th of July, 1865, the Appellant presented a long petition to the Financial Commissioner, which was the commencement of the proceedings out of which this appeal has directly arisen. This document is in terms confined to the previous adjudication concerning the single village of *Sessendee Khas*. It complains, first, that no distinct issue whether the Appellant was or was not in proprietary possession of a third share in mouzah *Sessendee* had been regularly settled and tried in the suit. It contends that such possession was established by, amongst other evidence, a kheut and settlement statement forming part of the proceedings on the summary settlement of 1858. It then contests the conclusions of the Settlement Commissioner, in his order of the 22nd of September, 1864, to the effect that the Appellant's claim was barred by the Respondent's sunnud; and that any possession which she may have had in the village having been of a proprietary and not of an under-proprietary character, it could not entitle her to be recognised as under-proprietor. It then cites certain paragraphs of a Circular Letter, No. 6 of 1862, and submits that the Petitioner's case falls within the 6th of those paragraphs, and entitles her to have it referred for the orders of the Governor-General in Council, in order to have the Respondent's sunnud reformed. The prayer of this petition was that the Court would be pleased to decree to her the continuance and enjoyment of the rights she was entitled to under and by virtue of the kheut and Settlement Statement A; or to refer the case for the order of the Governor-General in Council, in conformity with the ruling laid down in paragraph 6 of Circular No. 6 of 1862.

This application would seem, from a petition filed by the Respondent on the 21st of March, 1866, to have been heard by the Financial Commissioner on the 1st of March *ex parte*. The Petitioner complained of this, and finally begged that if his objections were not still to be heard, his petition might be forwarded to His Excellency the Governor-General in Council, with the report which the Financial Commissioner proposed to make in the case. The first step taken by the Financial Commissioner was to write, on the 28th of March, 1866, a letter to

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the Secretary of the Chief Commissioner of *Oudh*, the important paragraphs of which are the following :—

"2. The widow brought her claims in the regular way before the Courts, both for the proprietary rights and then for under-proprietary rights; but it was held that her suit for the first was barred by the sunnud being in the name of Rajah *Kashi Pershad* only, and for the second, because any title she may have had independently of our arrangements must have been to full proprietary rights, and that she had none to rights held in subordination to the taluka.

"But having allowed her case to be argued again by counsel, I find that although the sunnud was made out in the name of Rajah *Kashi Pershad* alone, it is not in agreement with the orders for the settlement of 1858 A.D.

"4. That settlement was made by a proceeding of Captain *L. Barrow*, Special Commissioner of Revenue, a translation of which is annexed for reference. It will be seen that after stating that in 1264 F. (1856 A.D.), fifteen villages were settled with the talukdar (Rajah *Kashi Pershad*), four (1) with the widow of *Shunker Sahai*, and seven with both as co-partners, and that in the co-parcenary villages two-thirds belonged to the talukdar, and one-third to the widow, the record goes on as follows :—'It is, therefore, ordered that the triennial settlement of the taluka be made with Rajah *Kashi Pershad*, talukdar, on a jumma of Rs.23,251, according to the assessment of 1264 F., and that the widow of *Shunker Sahai* be recorded as co-partner.'

"5. The widow's name was duly entered in the kheut as one-third owner of the seven villages referred to, but this document would be of no effect *per se*, and apart from the specific recognition of the widow's right in the settlement proceeding.

"According to the Governor-General's Order of the 10th October, 1859, it is ruled that talukdars with whom the summary settlement was made, thereby acquired the proprietary title in their talukas. This order is generally held to be law. It would follow, therefore, that the widow is entitled to have her name entered in the talukdary sunnud as owner of the four villages, and in one-third of the seven villages, her proprietary right to which was affirmed by the settlement proceeding."

"13. If the case were within the ordinary jurisdiction of the Courts, nice questions would arise as to the right of the widow of *Shunker Sahai* to more than a life interest in her husband's estate, and as to the title of the husband of her brother-in-law's widow to succeed to it. But there is no occasion to discuss these. The talukdar's title is good under his sunnud, but it appears to me that the widow's is equally good to her share as defined under the proceeding of summary settlement.

"14. It should be mentioned that Rajah *Kashi Pershad* is one of those talukdars whose proprietary rights were specially reserved in the Proclamation of the Governor-General, under which the soil of *Oudh* was confiscated. The Rajah maintains that he thus became proprietor of the whole taluka, how many soever shareholders there may have been previously. Without discussing this point on

(1) For these four villages the widow has obtained a sub-settlement after a good deal of litigation. Their names are 1, *Outurgaon*; 2, *Daberia*; 3, *Bursooa*; 4, *Kuroulee*.

its merits, I may observe that it is not available to the Rajah in the particular case, as the terms of the Government Order of the 10th October, 1859, are distinct, that those with whom the summary settlement was made became *ipso facto* proprietors without reference to any antecedent rights.

"15. As much stress is laid on the rigid maintenance of the literal terms of the settlement of 1858, and as the widow has gone to much expense to have the case argued on that ground, I hold that it is not open to me to do otherwise than state the case as above for the consideration of the Chief Commissioner."

There is considerable confusion in the record as to what was done, or intended to be done, on this report. This is a question which will be hereafter considered. One thing is certain, that nothing final was done until the 7th of November, 1868, when Colonel *Barrow*, who had then become Financial Commissioner, made an order, of which the substance is contained in the following paragraph:—"On these grounds, therefore, a life interest in the four villages named in the margin is decreed to the widow of *Shunkur Sahai*, who will pay the Government demand, plus 10 per cent. only, to the talukdar: and she will be also entitled to a one-third share of the profits in the seven villages named in margin when the annual accounts are made up." Against this order the Appellant under leave of the Court in *Oudh* has appealed to Her Majesty in Council, and the Respondent, with the like leave, has preferred a cross appeal.

The Appellant in her case describes the order as *a proceeding purporting to be a judgment* of the then Financial Commissioner; and her learned counsel on the opening of the appeal treated the order as one made *ultra vires*. Their argument on this point seemed to assume that the memorandum of Major *MacAndrew* was in the nature of an order made by competent authority, which sent the case back to the Judicial Commissioner for adjudication upon one point only, viz., whether, by the summary settlement, the widow was declared entitled to the third of the whole estate, or only to the four villages and one-third of the seven. It seemed also to assume that by the report of Mr. *Davies* of the 28th of March, 1866, whatever power the Financial Commissioner might have had to determine generally the rights of the parties on the merits was spent; and, further, that the Chief Commissioner either had determined to refer the case to the Governor-General in Council, in order to have the Respondent's sunnud altered according to the result of Major *Barrow's* answer to the specific question referred to him, or at least had reserved to himself the power of so determining when he should receive the answer. If this were the true view of the case, it would, in their Lordships' opinion, be a very grave question whether any appeal against the order would lie to Her Majesty in Council. It was indeed suggested that the order, though made without jurisdiction, purported to be a judicial order, and consequently that the appeal would lie. But even if that were so, the utmost their Lordships could do would be to discharge Colonel *Barrow's* order as made without jurisdiction. They would certainly decline to adjudicate upon the propriety of the reformation of the Respondent's sunnud by the Governor-General in Council, an act to be done, not by any Court of Justice, but by the supreme executive authority in *India*.

Their Lordships, however, having come to the conclusion that this view of the case is erroneous, do not think it necessary to consider more particularly what could or ought to have been done, had it been correct. They conceive that the

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argument ascribed a force and an effect to the memorandum of Major *MacAndrew* which do not belong to it. That gentleman had no power or authority to direct a judicial inquiry into any matter. He was but the secretary of the Chief Commissioner, also an executive officer. The memorandum in question does not even purport to be an extract from a despatch written by the authority of the Chief Commissioner. It is more like the mere memorandum of a secretary or *précis* writer submitting, for the information of his superior, his own view of the documents on which the latter was to pass an order. Again, this paper is dated the 10th of April, 1866; and it appears from the record that on that date the Respondent was petitioning the Chief Commissioner; that the Appellant's counsel was addressing the same officer on the 6th of October, 1866; that in October, 1867, the Appellant was memorialising the Governor-General in Council and treating the question as still open; that the Chief Commissioner had returned the files to the officiating Financial Commissioner, suggesting that this case should be disposed of by mutual agreement or by the talukdar's association; that some such arbitration was attempted, but that in December, 1867, the Appellant, dissatisfied with that course of proceeding, prayed that the trial of her case should be sent back to the Financial Commissioner; and that, finally, both parties appeared by counsel before Colonel *Barrow*, as Financial Commissioner, on the 7th of November, 1868, and argued their respective cases before him. The conclusion therefore, to which their Lordships have come upon these confused, and perhaps somewhat irregular proceedings, is that the Chief Commissioner never took action upon Mr. *Davies's* report, in order to have the Respondent's sunnud reformed, or determined to take such action; but that in November, 1868, the case raised by the Appellant's petition of the 18th of July, 1865, was still open for adjudication by the Financial Commissioner; and that the order under appeal must be taken to be the final judicial order on that petition. The learned counsel for the Appellant, at the close of the argument, seemed to intimate their desire to have the case thus dealt with. The learned counsel for the Respondent, however, did not abandon their contention that the suit had been finally disposed of when Mr. *Davies* rejected the first petition for review; and that the petition of the 18th of July, 1865, and all the subsequent proceedings were irregular. Looking, however, to the proceedings of the Courts below; to the conduct of the Respondent therein; and, indeed, to his printed case filed on this appeal; their Lordships are not disposed to adopt this view, but consider that it is open to them to review, as they will now proceed to do, Colonel *Barrow's* order on its merits.

The first question is, whether the Appellant has made out a title to any talukdary rights. It is admitted on all hands that the Respondent's sunnud, whilst it stands, is an effectual bar to her claim of such rights. And, since she has no interest in many of the villages comprised in the taluk, it would apparently be necessary in order to make her a talukdar, not only to reform the Respondent's sunnud, but also to break up the existing settlement, and to re-settle the estate in three different portions. Whether, since the passing of the *Oudh Estates Act*, the first of these objects could be effected even by the Governor-General in Council without a special Act of the Legislature, seems to their Lordships to be very questionable. The second will be found to be inconsistent with the title to talukdary rights which she sets up. For it is admitted by Mr. *Davies*, the officer most favourable to her, that the sole foundation on which her title rests is

to be found in the summary settlement of 1858, and the effect given thereto by the Governor-General's Order of the 10th of October, 1859. In paragraph 8 of his letter he says distinctly: "It is nothing to the purpose to inquire whether the widow had any rights independent of the summary settlement, or whether under it she got more or less than she was entitled to, as its effect has been made absolute and irrevocable." It is, however, clear that, if the summary settlement did anything, it treated all the twenty-six villages as forming one taluk, to be settled for with somebody as talukdar, at one aggregate jumma.

Again, their Lordships are not disposed to assent to the proposition contained in the 14th paragraph of Mr. *Davies's* letter, to the effect that a title derived from the summary settlement and the Governor-General's order must be taken to override the rights acquired by the Respondent under the Proclamation. Before the summary settlement the Respondent had been declared sole hereditary proprietor of the lands which he held when *Oudh* came under British rule (he seems to have been then talukdar), subject only to such moderate assessment as might be imposed on them; and the proprietary right of all other persons in the soil stood confiscated to the British Government, which reserved to itself the right of disposing of it. He had, therefore, at the date of the settlement, the declared right to engage for the revenue. His doing so could not supersede or detract from the rights which he had already acquired, or become the foundation of his title. On the other hand, the general body of talukdars re-acquired no interest in their forfeited lands until they had been admitted to make the settlement. Accordingly, the *Oudh Estates Act*, though it enacts that the estates of both classes of talukdars shall be of the same nature, and be held subject to the same conditions, recognises the distinction between them in the matter of title; and directs that the Respondent and the four other loyal talukdars in the same category with him, shall have their names entered in a separate schedule.

Lastly, their Lordships are of opinion that there is no ground for holding that the summary settlement, and the subsequent order of 1859, have conferred talukdary rights on the Appellant. The order declared that every talukdar with whom a summary settlement had been made since the re-occupation of the province, had thereby acquired certain rights. To bring any person within the operation of this clause, he must be shewn to be one with whom a summary settlement was made between the 1st of April, 1858, and the 10th of October, 1859, as *talukdar*. It does not appear to their Lordships that this can be predicated of the Appellant. She never entered into any engagement for the revenue. From the settlement proceedings, the statement A, and the roobacarry, it appears that the Rajah was the only person who applied for the settlement; that he sought to settle for all the twenty-six villages as one estate or taluk; that he was described on the face of the proceedings as "the talukdar," the Appellant being spoken of only as the widow of *Shunker Sahai*; and that the triennial settlement was then directed to be made, and was made with him, the kaboolyut being taken from him alone. Undoubtedly the application of the Rajah stated the interest of the applicant both in the four and in the seven villages, and admitted that, in 1856, and immediately after the annexation of *Oudh*, there had been three distinct settlements of the villages, for which he was then seeking to settle as one entire estate or taluk. But this latter fact, though consistent with the fiscal policy which prevailed between the annexation and the Mutiny,

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is alike inconsistent with the policy inaugurated by Lord *Canning's* Proclamation, with the status of talukdar thereby assured to the Respondent, and with the final order of the Settlement Officer. The construction which their Lordships would put on the words "and that the name of *Shunker Sahai's* widow be recorded as shareholder" is not that the Settlement Officer gave or intended to give to the Appellant the right of making a summary settlement as talukdar, but simply desired to place on record, for her benefit, her admitted proprietary and beneficial interest in some, and some only, of the villages which made up the settled taluk.

If this be so, the next question is to what, if any, relief is the Appellant entitled, though she has failed to establish a title to talukdary, or even to malgoozaree rights. It will be convenient to consider this first with respect to her interest in the seven villages, and afterwards with respect to the four villages, since her interests in the two classes of villages may admit of different considerations.

As to both, however, it is to be observed that the necessary consequence of holding that the twenty-six villages have been conclusively thrown into one taluk, of which the Respondent is sole talukdar, is that the interest of the Appellant in the villages in which she is interested, whatever it may have been originally, has become in some sense subordinate, or sub-proprietary. The *Oudh* Blue Book, and in particular the memorandum of Mr. *Charles Currie* at p. 216, shew how, under the native Government, the great taluks grew up, and how, sometimes by a process of disintegration, sometimes by one of acquisition, they came to include zemindaries in which all proprietary right, short of a nominal superiority, was vested in persons other than the talukdar. In such cases the talukdar alone held, as it were, *de capite* from the State, and alone engaged for the payment of the public revenue; but he held his lands subject to the rights of the proprietors intermediate between him and the cultivators of the soil. It seems to have been the general policy of the *Oudh* settlement, begun by Lord *Canning* and continued by his successors, to perpetuate this system, however much the authorities may from time to time have somewhat oscillated between the policy of creating a landed aristocracy and that of protecting against such an aristocracy the rights, real or supposed, of others in the soil. Their Lordships can see no reason why the Appellant, because she may have originally claimed the superior, should not be allowed to assert in this suit any subordinate right to which she may be entitled. And this, which was originally the view of Mr. *Capper*, seems to have been finally ruled by Colonel *Barrow*. And it may be observed that in some of the earlier proceedings she has put her case in the alternative.

Again, Mr. *Capper* seems to have admitted, as to the seven villages, that though the Appellant had not been in independent possession of one-third of the collections of these villages; though the collections were made in common, and, therefore, presumably by the Respondent, the talukdar; yet that the latter might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit, because her agent had failed to produce a deed in writing so binding the talukdar. Colonel *Barrow*, however, appears to have held that the admission of the Rajah at the time of the summary settlement, and on other occasions (the former being

in the nature of an admission on record), were equivalent to such a deed; and that accordingly the relation of trustee and *cestui que trust* having, so to speak, been established between them, she was entitled to a one-third share of the profits of these villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur.

Colonel *Barrow's* order also recognises the proprietary interest, treating it as a subordinate interest, of the Appellant in the four villages. But the Appellant insists that he has improperly subjected her to pay a percentage of 10 per cent. to the talukdar over and above the Government demand. It is somewhat difficult for their Lordships in the absence from the record of the proceedings relating specifically to these villages to deal with this portion of the Appellant's case. In a marginal note to his letter of the 28th of March, 1866, Mr. *Davies* states that the widow had obtained a sub-settlement for these four villages. If that were a final settlement, their Lordships, on the materials before them, would not see their way to disturbing it. Colonel *Barrow*, however, appears to have thought that the amount payable by the Appellant to the Respondent in respect of these villages was a point open to him for decision; and his finding thereon is now to be reviewed. If there were no positive law on the subject their Lordships would see no ground for subjecting the Appellant, who as zemindar must be in the collection of the rents, to the payment of more than her proportion of the Government revenue. But the propriety of the imposition of this 10 per cent. seems to depend upon the effect of the provisions of the *Oudh Settlement Act*, No. XXVI. of 1866. That Act was passed to give the force of law to certain Rules regarding sub-settlements and other subordinate rights of property in *Oudh*. They seem to apply to all persons possessed of subordinate rights of property in taluks in *Oudh;* and the 3rd clause of the 7th of these Rules says: "In no case can the amount payable during the currency of the settlement by the under-proprietor to the talukdar be less than the amount of the revised Government demand, with the addition of 10 per cent." Colonel *Barrow* appears therefore to have made the amount payable by the Appellant the least which in his view of it the law permitted.

Their Lordships conceive that they too are bound by this enactment. If the view which they have taken of the Respondent's rights as talukdar is correct, it is impossible to treat the interest of the Appellant in these villages as other than that of a subordinate zemindar. If she has lost the right of settling directly with Government for the revenue, she must, if she retains any interest in the villages, be treated as one entitled to, and liable to make a sub-settlement for them. And if this be so she seems to fall within the provisions of the statute.

The only remaining question relates to the extent and nature of the Appellant's interest in the property which has been found to belong to her. Colonel *Barrow* has decreed to her only a life interest. He seems to have had a notion that if her interest were more than this she would have an absolute power of disposing of the villages and of breaking up the taluk. This could only have happened had she been found entitled to full talukdary rights; and even in that case it may be doubted whether the effect of the Governor-General's letter of 1859, and the subsequent legislation, is to relieve a Hindu widow, though a talukdar, from the disabilities imposed upon her by the general law. Such a construction seems opposed to the 23rd section of the *Oudh Estates Act*, at least as regards a

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widow who takes a taluk by inheritance. The Appellant, however, is now to be treated not as a talukdar, but as the proprietor of certain villages and rights within a taluk. These she acquired by inheritance from her husband, and her estate is not a life interest, but the estate of inheritance of a Hindu widow with all its rights and all its disabilities. Their Lordships, therefore, will humbly recommend Her Majesty to vary the order under appeal by declaring that the Appellant, as the widow and heiress of *Shunker Sahai*, is entitled to a Hindu widow's estate of inheritance in the four mouzahs, *Daberia*, *Bursooa*, *Kuroulee*, and *Ooturgaon*, and in a one-third share of the profits in the seven mouzahs, *Sessendikhas*, *Salsamow*, *Laloomur*, *Shahpur*, *Kharehra*, *Meerrampur*, and *Jubrelah*, such share to be ascertained and paid when the annual accounts are made up, and that she is further entitled to have a sub-settlement of the said four villages on the terms of paying the Government demand *plus* 10 per cent.

In this case in which there are appeal and cross appeal, neither of which has been wholly successful, their Lordships think that each party should bear his or her own costs.

(*b*) The second case, in appeal from the same Court, and decided on the same day, was as follows:

RANEE OF CHILLAREE ... ... PLAINTIFF;

AND

THE GOVERNMENT OF INDIA ... ... DEFENDANT.

In a suit brought in 1867 to establish Plaintiff's right to a talukdary in *Oudh*, as grandmother and heiress to a deceased infant Rajah, with whom a summary and temporary settlement thereof had been made; it appeared that the taluk had been, after the death of the infant Rajah, and before the letter of the 10th of October, 1859, resumed by the Government:—

Held, that the Plaintiff as heir of a talukdar who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased Rajah.

Act I. of 1869, did not apply to the case.

THE judgment of their Lordships * was in the following terms:—

This is an appeal from a decision of the Financial Commissioner of *Oudh*, dated the 21st of October, 1868, reversing on special appeal a judgment of the Commissioner of *Seetapore*.

The suit was brought by the present Appellant against the Government of *India*, the present Respondents and others, in the Court of the Assistant Settlement Officer of zillah *Seetapore* in the course of a regular revenue settlement for the Province of *Oudh*. The object of the suit was to establish the alleged right

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER. Assessor: SIR LAWRENCE PEEL.

of the Plaintiff to the proprietorship of taluka *Chillaree*. The plaint was filed on the 26th of January, 1867.

The Plaintiff was the mother of Rajah *Bulbhudur Singh*, who was killed at *Nawabgunj*, in the year 1858, whilst fighting in open rebellion against the British Government. He left a widow *enceinte*, who shortly afterwards gave birth to a son, Rajah *Digbehoy Sing*. It was found by the Assistant Settlement officer, the Court of first instance, that a summary settlement for the taluka, comprising ninety-two villages, was made with the infant Rajah *Digbehoy Sing* by Mr. *Forbes;* that it was confirmed by the Financial Commissioner, and that it remained in force till the child's death on the 25th of March, 1859. The mother died a few days later, leaving the Plaintiff, the grandmother, the heiress of the child, according to the Hindu law. It was also found by the Assistant Settlement Officer, that, "in July, 1859, Captain *Thomson*, the Deputy Commissioner, wrote to the Commissioner giving a statement of the case, and recommending, apparently on grounds of policy, that the taluka should be resumed; that the case was forwarded to the Chief Commissioner for orders, who, after consulting the Judicial Commissioner, as to the nature of the present claimant's rights, finally rejected her claim and reported the resumption of the estate to the Government of *India*."

The estate was, in fact, resumed, and in September, 1859, an allowance of Rs.5000 a year out of the estate, commencing from the death of the child was, with the sanction of Government, reserved to the Plaintiff for life.

The Assistant Settlement Officer gave judgment in favour of the Plaintiff, and decreed to her the absolute hereditary and transferable right in all the villages included in the settlement with Rajah *Digbehoy Sing*. On regular appeal to the Commissioner, the decree was modified by ordering that the Plaintiff was to have only a life interest in the property, and that execution should issue in a month. The effect of those decrees, if upheld, would be to subject the present holders, to whom the greater portion of the estate has been granted for loyal services, to be turned out of possession, at any rate during the life of the Plaintiff. The Financial Commissioner, upon special appeal, reversed the decision of the lower Courts and dismissed the Plaintiff's suit.

It was contended at the Bar by the learned counsel for the Respondents, that the revenue settlement with Rajah *Digbehoy Sing* was never completed, and, indeed, it was so held by the Financial Commissioner in the third reason given in the conclusion of his judgment. But their Lordships are of opinion that the first two lower Courts, having substantially found that a revenue settlement was made with the infant, it was not open to the Financial Commissioner on special appeal to overrule those findings. Indeed, the grounds of special appeal to the Financial Commissioner did not raise the question whether a summary revenue settlement was in fact made with the infant *Digbehoy Sing*, but merely the questions whether the summary settlement was ratified by the letter of Government of the 10th of October, 1859, and whether the estate sued for was legally vested in the infant.

It appears to their Lordships that it must be assumed, in accordance with the findings of the first two Courts, that a revenue settlement was in fact entered into with the infant Rajah, but that the taluka was resumed by Government after his death, and long before the letter of the 10th of October, 1859.

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It is clear that by the Proclamation of the Governor-General of the 15th of March, 1858, the authority of which cannot now be disputed, the proprietary right in the taluk in question was, together with nearly the whole of the proprietary rights in the soil of the Province of *Oudh*, confiscated to the British Government; and that that right was liable to be disposed of in such manner as the Government might think fit. It is equally clear that the temporary revenue settlement entered into with the infant Rajah did not of itself vest in him the absolute proprietary and inheritable right in the taluka. The duration of the revenue settlement was limited to three years, which period had expired long before the Plaintiff's suit was commenced. The sole question is, whether the letter of the Governor-General of *India* in Council of the 10th of October, 1859, coupled with that revenue settlement, vested an absolute proprietary and inheritable right to the taluka in the young Rajah, who died on the 25th of March, 1859, more than six months before that letter was written; or if not, whether it vested in his heirs-at-law as grantees, an inheritable proprietary right which the deceased Rajah himself never possessed.

The letter, which was from the Secretary to the Government of *India*, Foreign Department, to the Chief Commissioner of *Oudh*, is set out in the first schedule to the *Oudh Estates Act*, No. I. of 1869. The second paragraph of the letter is as follows:—

"2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the talukdars in possession of the talukas for which *they* have been permitted to engage, is pleased to declare that every talukdar with whom a summary settlement *has been made* since the re-occupation of the province, *has* thereby acquired a permanent, hereditary, and transferable proprietary right, viz., in the taluka for which *he has* engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka."

The letter and the recital contained in it shew that the object of the Government was to maintain in possession those talukdars who then were in possession under summary settlements entered into with them after the re-occupation of the province. The talukdars who were declared to have acquired the right conferred by the letter were those who had been permitted to engage. Nothing was said as to the heirs of talukdars who had been permitted to engage, and who had died between the time of the engagement and the date of the letter. It is not necessary to decide whether such heirs, if in possession at the date of the letter, would have been within the spirit or meaning of it. It is clear that the letter, which was a mere act of grace, was not intended to operate as an original grant to such heirs, for, if such were the case, the heir, if a widow, mother, or grandmother, would have taken an estate descendible to her own heirs instead of the estate of a Hindu female heiress descendible to the heirs of the person to whom she succeeded; and thus the estate would have been taken out of the family of the talukdar who had been permitted to engage. The letter could not operate as a grant of an hereditary estate to a deceased talukdar and his heirs. The only way in which it could operate for the benefit of the heirs of a deceased talukdar, who had been permitted to engage in a summary settlement, would be, by its being treated as a retrospective declaration of the effect of the revenue settlement for which he had been permitted to engage. Such a construction cannot be put upon

the letter with reference to a talukdar who had died long before the date of the letter; upon whose death the estate had been resumed by Government, and whose heirs had not been permitted by Government to succeed to the taluk even during the continuance of the temporary revenue settlement.

Their Lordships are of opinion that the letter ought to receive a liberal interpretation in order to effectuate the intentions of the Government; but they consider that it would be acting in direct opposition to those intentions if the letter were to be read in the sense contended for, as one which pledged the Government to restore a possession to which they had, in fact, put an end, and to vest in a dispossessed claimant an interest which the settlement itself did not give. Such an interpretation would be contrary both to the letter and spirit of the document, and at variance with every legitimate rule of construction. Their Lordships, therefore, concur in the view of the Financial Commissioner that the letter of the Governor-General in Council of the 10th of October, 1859, did not apply to the revenue settlement for which the infant Rajah was permitted to engage, and which was resumed by Government after his death, and before the letter was written; and that it was not intended by that letter to create in the Plaintiff a proprietary right by inheritance in the taluk by virtue of a temporary revenue settlement for three years to which she had not been allowed to succeed. The temporary revenue settlement was resumed in 1859, and the suit was not brought until 1867.

Their Lordships are of opinion that Act No. I. of 1869 cannot apply to this case, in which the suit was commenced in 1867, and finally decided by the Courts in *Oudh* in 1868; but even if the Act could apply by retrospective operation it would not vest a right in the Plaintiff, for the word "talukdar" in the 3rd section of the Act was defined to mean "a person whose name is entered in the first of the lists mentioned in section 8," and the Plaintiff's name has never been entered in such list. The case of the Appellant does not appear to their Lordships to fall within either the words or the spirit of the letter of the 10th of October, 1859, or of the *Oudh Estates Act* of 1869. They will, therefore, humbly recommend Her Majesty in Council to affirm the decision of the Financial Commissioner with the costs of this appeal.

J. C.*
1877
June 30;
July 3.

SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU . . . . . } PETITIONER;

AND

SRI GAJAPATHI RADHAMANI PATTA MAHA DEVI GARU . . . . . } COUNTER-PETITIONERS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Mitakshara Law—Joint Estate of two or more Widows—Separate Enjoyment—Survivorship.

Acording to the Mitakshara law, as it prevails in southern *India*, two or more lawful wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment.

Although widows so taking have no right to enforce an absolute partition of the joint estate between them, they have power to arrange for separate enjoyment of their shares, their respective rights by survivorship and otherwise remaining unaffected.

Jijoyiamba Bayi Saiba v. *Kamakohi Bayi Saiba* (1) affirmed.

APPEAL from an order of the High Court (March 11, 1874), passed in execution of two orders of Her Majesty in Council (August 9, 1870, and March 3, 1873).

The facts of the case previous to the decision in 1870 will be found in the reported decisions (2).

The main question decided in this appeal was whether the Respondent *Radhamani*, as the junior wife of her deceased husband, was merely entitled to maintenance out of her husband's estate during the life of the Appellant, the elder widow, or whether she was entitled equally with the Appellant to the separate possession and enjoyment of a share therein.

The circumstances under which this issue arose appear in the judgment of their Lordships.

Leith, Q.C., and *Grady*, for the Appellant, after arguing that

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR MONTAGUE E. SMITH.

(1) 3 Madras, H. C. R. 424.
(2) 2 Madras, H. C. R. 369, and 13 Moore, Ind. Ap. Ca. 497.

having regard to the course of proceedings in the Court below, it was still open to them to shew what were the rights of the widows *inter se*, contended that, even if it had been found (which they disputed) that the Respondent was the second wife of the Appellant's deceased husband, still she would only be entitled to maintenance out of her husband's estate during the lifetime of the Appellant. The order of the High Court of March 11, 1874, directing the moiety of that estate to be divided, and delivered in equal moieties into the possession of the Appellant and Respondent, was contrary to Hindu law, which does not recognise the right of Hindu widows to a partition of their husband's estate. Although according to the *Bengal* school widows may take equally separate shares in their husband's estate; yet the rule in *Madras* is that the elder widow for the time being holds possession, the other widows succeeding thereto by seniority and meanwhile entitled only to maintenance thereout: see *Strange's* Hindu Law, vol. i. pp. 56 and 136. The practice in the *Madras* Presidency has been governed by the statement of the law by Sir *T. Strange* and by the two decisions in the select Reports, viz.: *Sree Vutsavoy Juggannada Rauze* v. *Sree Vutsavoy Boochee Setiah*, decided in 1824 (1), and *Numba Talavachy* v. *Zungama Nautchiar*, decided in 1835 (2).

They referred also to *Jijoyiamba Bayi Saiba* v. *Kamakohi Bayi Saiba*, generally called the *Tanjore Case* (3).

Norton, and *Mayne*, for the Respondent, in reference to the rights of the widows, contended that they take their husband's estate jointly. The three authorities cited by Sir *Thomas Strange*, vol. i. p. 136, are taken from *Jagannatha's* Digest, a *Bengal* authority; but see 2 *Strange's* Hindu Law, vol. ii. p. 90, where there is an answer of a pundit in a case from the zillah of *Salem*. The two cases from the *Madras* Select Decisions referred to on the other side are cases of indivisible zemindaries to be held by one at a time. They referred to certain untranslated passages of the Mitakshara, Smriti Chandrika, and Vyavahara Mayukhu, to *Jijoyiamba Bayi Saiba* v. *Kamakohi Bayi Saiba* (3), and *Bhug-*

(1) 1 Madras Sel. D. 452 (see Norton's Leading Cases in Hindu Law, 506).
(2) 2 Madras Sel. D. 44.
(3) 3 Madras, H. C. R. 424.

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Bádeen Doobej v. *Myna Baee* (1). Then as to the point whether the zillah Court was entitled to give separate shares to the two widows, it was submitted that they were coparceners, and entitled, if not to a separation in title, at least to a separation in possession and enjoyment. See "Futwah" in 2 *Strange's* Hindu Law, p. 90. The two passages in *Strange* only support certain passages of the Dayhabaga, see ch. xi. sec. 1, which is opposed to the view in the Smriti Chandrika, ch. xi. s. 57, where the property is directed to be divided in equal shares between the widows. The untranslated or omitted passages of the Smriti Chandrika are referred to in *Strange's* Manual of Hindu Law (1856), sec. 320, and in *Stokes's* Hindu Law [1865].

Leith, Q.C., replied.

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July 13.

The judgment of their Lordships was delivered by

SIR JAMES COLVILE:—

This is an unfortunate case, inasmuch as, though reduced to a question of the interest of two Hindu widows in that which seems to be an inconsiderable estate, it now comes for the third time before this tribunal.

It is not necessary to go at any length into the earlier history of the case. It is sufficient to say that the litigation arose out of the construction to be given to the document constituting a certain family arrangement by which *Gopinadha* and *Krishna*, the two sons of one *Padmanabha*, had held the talook *Tekkali*. Each of these sons appears to have questioned at one time the legitimacy of the other, but ultimately their disputes were settled by this family arrangement, and after the death of the surviving brother, *Gopinadha*, his widow took exclusive possession of the whole taluk. The question then arose whether she was entitled to hold that possession, one of the widows of *Krishna* claiming his share, and certain illegitimate sons of the two brothers also claiming to share in the estate. The construction of the document came before the Courts in *India*, and the High Court of *Madras*, dealing chiefly with this clause of it, "If the legal widows of both of them

(1) 11 Moore's Ind. Ap. Ca. 487.

should have no male issue, and if there be any sons born out of wedlock, the taluk shall be divided in equal shares," declared that on the true construction of the agreement the estate was to be equally divided between the wives and the sons born in concubinage, and remanded the suit to be treated as a suit for the administration of an estate, directing the Civil Judge to inquire who were the parties "entitled on the construction aforesaid, and to make the parties to the present suit, and to Regular Appeal 26 of 1862, and all other claimants, parties to that inquiry."

The case went down upon that remand, and the present Respondent having come in and claimed to be a widow of the younger son, *Krishna*, the Civil Court found that the estate was to be divided into five equal portions, one of which was to be given to the possession of each claimant, those claimants being the two illegitimate sons, the two widows who had been parties to the previous litigation, and the widow *Radhamani*, who had come in in order to establish her title upon the inquiry.

Immediately after the passing of that order the appeal to Her Majesty in Council appears to have been allowed, and it came on in due course in the year 1870, and this Committee, putting a different construction upon the family arrangement, and in particular on the clause which has been read, ordered that the decree of the High Court should be reversed and "a decree made declaring that, according to the true construction of the agreements of the 26th of November, 1838, and the 29th of July, 1844, the widow of *Gopinadha*, the Appellant, and the Respondent, the widow of *Krishna*, upon the deaths of *Gopinadha* and *Krishna* without male issue, became entitled from and after the death of *Gopinadha* as Hindu widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the Respondent, *Nilamani Patti*, but without costs." In the course of that judgment, which was delivered by Lord *Cairns*, it was observed, "The result of this inquiry," that is, the inquiry directed by the High Court, "has been that two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively." The inaccuracy in this statement may be accounted for by the fact that the order of the Civil Judge, which was all that

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appeared on one of the records, does not specify who the five claimants were. It is true that in another of the records, there being altogether three, it appeared more distinctly from the judgment of the Civil Judge, upon which his order was made, that he had found there were not three illegitimate sons and two widows, but three widows and two illegitimate sons. The Committee, however, was not set right at the time by the counsel on the appeal, who were probably equally deceived, and thought that the effect of the Judge's order was correctly stated.

In that state of things the first order of Her Majesty went out to *India* to be executed. Difficulties then arose, and the execution of part of the order was suspended until the widow of *Radhamani*, who may be called the junior widow of *Krishna*, should have applied to this Board in order to have any misapprehension concerning the effect of the first order of Her Majesty corrected. That application was opposed by the other widow, *Nilamani*. The rights of the widow of *Gopinadha* had been finally determined, and she had disappeared from the litigation. Their Lordships' report to Her Majesty on this application was in these terms: "Their Lordships being of opinion that the Respondent *Nilamani Maha Devi* represented in these appeals not only her own interest but also the interest of all the lawful Hindu widows (if more than one) of *Krishna*, and that the order of Your Majesty of the 9th August, 1870, declaring the title of *Nilamani* as Hindu widow to the moiety of the estate, was an order enuring to the benefit of any other (if there should be found to be any other) such lawful widow, and that the High Court, executing the said order, ought to have taken and ought now to take all necessary steps to give to the Petitioner (if one of such lawful widows of *Krishna*) such share, interest, or other benefit as under the law applicable to the case she would have been entitled to as such widow, along with *Nilamani*, of, in, or out of the one moiety of the said estate and the profits thereof, do not think fit to advise Your Majesty to make any further order in the present petition." This report was confirmed by an Order in Council of the 3rd of March, 1873; and the case then went back, and the High Court having to execute the original order of Her Majesty, as explained by this subsequent order, made the order of the 11th March, 1874, which is the subject of the present appeal.

Before considering the particular terms of that order it may be desirable to see what are the objections that were taken to it in *India*, and at their Lordships' bar. It was contended that the High Court was in error in treating as an ascertained fact that *Radhamani* was a widow, in the proper sense of the term, of *Krishna*, and that it ought to have directed an issue in order to ascertain whether she was the lawful widow of *Krishna* or whether her connection with him was only by means of a Gandharva marriage, which would not be a valid marriage according to Hindu law. The other point was, that assuming her to be a widow she was only a junior widow, and therefore, under the Hindu law, was only entitled to maintenance. Hence the two points raised in the Court below, and the two principal points now raised before their Lordships, concern, first, the status of *Radhamani* as a widow, and secondly, her rights, if a lawful widow of *Krishna*.

Their Lordships are of opinion that as far as the status of *Radhamani* is concerned the finding of the Court below is correct, and that it was not bound to direct any further inquiry upon that point. It appears to their Lordships that there was a sufficient *contestatio litis* between the two parties upon the inquiry which was directed to the Civil Court, to make the finding of that Court binding on both widows. It follows that there having been no appeal, it would have been conclusively found between those two persons, but for the effect of any order of the Crown that has since been made, that *Radhamani* was a joint widow with *Nilamani*. It is contended, however, that the effect of that finding has been swept away by the first order of Her Majesty in Council. That argument appears to their Lordships to be erroneous. The judgment on which the Order in Council was founded, although it recognised the proceedings which had taken place before the Civil Judge, did not in terms recommend the reversal of his finding. The order reversed no doubt the decree of the Court which made the remand, and substituted a new decree for it, but by that new decree it directed the High Court to "take all necessary steps to undo what may have been done under the decree reversed inconsistent with the rights thus declared." It therefore by implication assumed that things might have been done under the decree which were not inconsistent with the rights declared, and

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that what had been so done was to remain; and if the decision ascertaining the *status* of the *widow* was to remain, it would have been a very idle proceeding on the part of the High Court to institute a new inquiry in order to retry that question. It is however contended that at least the second order of Her Majesty in Council has made it imperative upon the High Court to take the course which the Appellants argue ought to have been taken. That order simply confirmed the report, which is more in the nature of an expression of opinion than of an order; is very cautiously expressed; and seems to avoid the decision of any question in the cause. It certainly did not order the High Court to institute any inquiry which would otherwise be unnecessary. It declared that the former order was to enure for the benefit of all the widows, if more than one, of *Krishna*, "and that the High Court executing the said order ought to have taken and ought now to take all necessary steps to give to the Petitioner (if one of such lawful widows of *Krishna*), such share, interest, or other benefit as under the law applicable to the case she would have been entitled to." This assumes that the Court ought to have taken proceedings in order to ascertain the number of *Krishna's* widows; and if it had in fact done so by means of the inquiry directed by the original decree, it can hardly be said to have been afterwards in error in treating as conclusive evidence of the status of *Radhamani* the finding of the Civil Court which stood unreversed. Their Lordships desire to add that they would have been extremely sorry to find themselves compelled to give way to any technical objection founded upon the mere words of the Order in Council, since from the other earlier proceedings, which have been put in by the Appellant for another purpose, it appears clearly that as early as the year 1856 or 1857 there were disputes between these ladies about a certificate and other matters; that in the proceedings arising out of those disputes there was no serious contest as to the status of *Radhamani* as the junior widow of *Krishna;* and that the suggestion that she was not lawfully married to her husband seems to have been an afterthought.

Having disposed of this first objection, it now becomes necessary to consider what are the legal rights of *Radhamani;* whether she has a right to share, as one of the widows, jointly and upon the

same footing with the other widow in the enjoyment of her husband's estate; or whether, as she is junior widow, her right is limited to maintenance. Their Lordships have already, in the course of the argument, intimated that this question was perfectly open to the Appellant; and was in no degree concluded by the order of Mr. *Morris*, the Civil Judge, which has been already alluded to, because his finding that the estate was to be divided into fifths, though inconsistent with the construction put upon the family arrangement by the High Court, which divided the estate among the members of a certain class *per capita*, was inconsistent with the order of Her Majesty in Council, which divided the estate into moieties, giving the share of each brother to the widow or widows of that brother. This point of law has now been ably and fully argued before their Lordships, and in their opinion the law of *Madras* must be taken to be in accordance with the decision in the third *Madras* High Court Reports, in what may be called the *Tanjore Case* (1). That there had been a notion that the law of Southern *India* on this point differed from the law of *Hindustan*, it is impossible to deny; but that notion seems to have been mainly founded upon the passages which have been cited from the work—a work of very high authority—of Sir *Thomas Strange*. Those passages are open to the observations that have been made upon them, namely, that even Sir *Thomas Strange* seems by his note on the first passage to have thought that the proposition was in some degree questionable; and that although the doctrine is repeated in the subsequent passage without qualification, it is not consistent with one of the cases, which are set forth in the second volume, viz., the *Salem Case*, at p. 91, or with the opinion of the pundits and the opinion of Mr. *Colebrooke* there stated.

There are, however, two decisions which are relied upon as having been made consistently with the doctrine laid down by Sir *Thomas Strange*, and which it is argued settled up to a certain time the law of *Madras*. It appears, however, to their Lordships, that although the learned Chief Justice in his elaborate judgment in the *Tanjore Case* (1) accepts those cases as decisions in point, and as confirmatory of the doctrine laid down by Sir *Thomas Strange*, they really are not authorities of that character. The

(1) 3 Madras, H. C. R. 424.

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first of them is clearly a case in which the question was which of several widows was to succeed to an impartible zemindary which could only be held by one. It appears upon the face of the report that that zemindary had been held by two brothers in succession, and therefore there can be no doubt that the subject of the litigation was an impartible zemindary. That was the last of the decisions, and was passed in 1835. In the other decision, which is of as early date as 1824, the subject of litigation would seem to have been also a zemindary; but the contest there was not between several widows, and did not relate to their rights *inter se*. A person claiming as nearest male heir had obtained possession of the zemindary, and had been ejected by the eldest widow of the zemindar. At her death this male claimant appears to have regained possession, and the question was whether the right of the elder widow had not survived to the second widow. It was held that it had so survived, and therefore the decisions merely affirmed the proposition of law, that where there are two or more widows there is a right of survivorship between them. On the other hand, their Lordships find that in that portion of *India* which is emphatically governed by the Mitakshara, namely, *Benares*, it is settled law that the widows take jointly. This view of the law is also consistent with Mr. *Colebrooke's* own opinion as expressed in the *Salem Case* (1). In order to support the Appellant's contention it ought, in their Lordship's opinion, to be shewn either by a course of decision, by custom, or by reason of some treatise which is of authority in *Madras* and not in the north of *India*, the law of *Madras* is different from what it is in the north of *India*. Their Lordships have dealt with the only two decisions cited; so far as treatises go, the Smriti Chandrika, which is of authority in *Madras*, seems to shew the contrary; and although the authority of the translation of that treatise has been impugned by Mr. *Leith*, his argument at most would shew that the Smriti Chandrika is not a conclusive authority against him; it certainly would not shew that that treatise is an authority in his favour. It seems to their Lordships by no means impossible that, as has been argued by Mr. *Mayne*, the *dictum* of Sir *Thomas Strange* was founded upon a misapprehension of the law that prevails in *Bengal*

(1) Strange's Hindu Law, vol. ii. p. 90.

as laid down by *Jimúta Váhána*. The proposition is not confirmed by the Mitakshara or by any treatise of paramount authority in the presidency of *Madras*, and it is to be observed that in Mr. *Strange's* Manual, published as early as 1856, and in other works, the accuracy of the law as laid down by Sir *Thomas Strange* appears to have been questioned. It is, therefore, incorrect to say that the settled law of *Madras* was first changed by the decision of the *Tanjore Case* (1) in 1867.

Their Lordships think that in this state of the authorities they would not be justified in treating the *Tanjore Case* (1) as improperly decided, or in dissenting from the proposition which the learned Chief Justice finally expressed in these words: "On this review of the authorities we come satisfactorily to the conclusion that the sound rule of inheritance is that two or more lawfully married wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." As to the mode of enjoyment, it has no doubt been decided both in the *Tanjore Case* (1) and in the case reported of *Bhugwandeen Doobej* v. *Myna Baee* (2), that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them. But in the *Tanjore Case* (1), after affirming this proposition, the learned Chief Justice said: "But we are at the same time of opinion that a case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance. We have no doubt that such relief can and ought to be granted when from the nature or situation of the property and the conduct of the co-widows or co-widow it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate." It also appears that in the case in the 11th *Moore*, the widows had made what was called a partition; that they had separately enjoyed their respective shares of the estate during their joint lives; and that it was not until the death of one of them that the question arose whether she had a right to dispose of her share, and whether if she had no right to dispose of it, it did not pass by survivorship to the other widow. It was held there that there was no objection to a transaction

(1) 3 Madras, H. C. R. 424. (2) 11 Moore, Ind. Ap. Ca. 487.

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which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remained coparceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. Their Lordships make these observations in order to meet the objection which, though not raised by the petition of appeal, and apparently never raised in the Court below, has been taken to the form of the decree. They think it sufficiently appears that in this case the state of things contemplated by the *Tanjore Case* (1) exists; that these widows could not go on peaceably in the joint enjoyment of the property; and that they have acted as if they had agreed that they are separately to enjoy, in the manner above indicated, their respective shares. Therefore their Lordships, guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected.

The only other point that was taken is that which relates to the costs of the former litigation, and their Lordships upon that are of opinion that whatever equity the widow who conducted the litigation might originally have had to recover a portion of the costs from the younger widow, that equity cannot be said any longer to exist in this case, in which the elder widow, who if considered to have sued as a trustee for the younger widow, has long and persistently repudiated any such trust; and by resisting the claim of the younger widow has occasioned all the costs of the litigation that has since taken place.

Upon the whole, then, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the order under appeal, and to dismiss the appeal with costs.

Solicitors for Appellant: *Keen & Rogers.*

Solicitors for Respondent *Radhamani: Gregory, Rowcliffes, & Rawle.*

(1) 3 Madras, H. C. R. 424.

BABOO LEKHRAJ ROY AND OTHERS . . . PLAINTIFFS; J. C.*
1877
AND
KUNHYA SINGH AND OTHERS . . . . . DEFENDANTS. *July* 6.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Construction—Mokurruri Pottah—Grant during Continuance of Lessor's Interest.

A pottah having been granted in 1808 to the Respondents' ancestor, "to continue during the term of the mokurruri" of the grantor; it appeared that the grantor's kubulyut, dated in 1788, acknowledged the power of the Government (which, however, had not been acted upon) to put an end to the lease of that date at the end of one year.

In a suit by the Appellants, who derived title from the said grantor, to annul the mokurruri tenure claimed by the Respondents, *held*, that the grant to the ancestor of the Respondents was not of an indefinite nature, enuring only for the life of the grantee, but passed to his heirs the whole interest of the grantor.

APPEAL from a judgment of the High Court (April 4, 1872) dismissing an application for review of a judgment (June 23, 1871) which dismissed the suit of the Appellants.

The question at issue in this appeal was whether a certain lease given on the 25th Cheyt, 1215 (A.D. 1808), of mouzah *Toee* by *Choonee Lall* to *Nirput Singh*, was an hereditary lease at a fixed rent, or whether the lessor could re-enter on the death of *Nirput Singh*. The lease is sufficiently set forth in the judgment printed below.

Nirput Singh died in 1856, leaving the Respondents his heirs. On the 27th of September, 1866, the Appellants purchased at an auction sale, in execution of a decree, the right, title, and interest of *Choonee Lall's* heirs in a moiety of the said mouzah, and brought the suit (described below) out of which this appeal arose, on the 27th of July, 1868. The subordinate Judge dismissed it, holding that the Respondents' mokurruri continued as long as that of the lessor lasted, and that the lessor's interest was not at an end.

The Judge of *Bhagulpore* confirmed this ruling; but the High Court in special appeal reversed (August 29, 1870) the judgment

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of the Courts below as to mouzah *Toee*, holding the pottah to *Nirput Singh* to be "at a fixed rent for the term of his natural life, provided he continued to pay the rent agreed upon." On the 23rd of June, 1871, after argument on review, this decision was reversed, and that of the Judge of *Bhagulpore* restored, and the suit accordingly dismissed.

Leith, Q.C., and *Doyne*, for the Appellants.

Cowie, Q.C., and *J. Cutler*, for the Respondents:—

The case of *Raboo Dhunput Singh* v. *Gooman Singh* (1) was referred to.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This suit was brought by the present Appellants to obtain possession of an eight annas share of mouzah *Toee*, and the plaint also prays for the annulment of the mokurruri tenure which the Respondents claimed to have in the mouzah under a pottah granted by one *Choonee Lall*. The Appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of *Choonee Lall* in the eight annas share of the mouzah. The Respondents are the heirs of *Nirput Singh*, who was the grantee under the pottah. The single question in this appeal is whether, upon the true construction of this pottah, and upon the evidence in the case, the grant was one to endure for the life of *Nirput Singh* only, or whether it was to endure so long as the interest of *Choonee Lall* existed. That involves also an inquiry into what the interest of *Choonee Lall* was.

The lease or pottah in question is dated in April, 1808, and the material parts of it are in these terms: "The engagements and agreements of the pottah on the kubulyut of *Nirput Singh*, lessee of mouzah *Toee*, pergunnah *Malda*, zillah *Behar*, are as follows: "Whereas I have let the entire rents of the mouzah aforesaid,"—describing what he had let,—"at an annual uniform jumma of

(1) 11 Moore, Ind. Ap. Ca. 433.

Sicca Rs.606, without any condition as to calamities, from the beginning of 1215 Fusli to the period of the continuance of my mokurruri." That is the term fixed in the pottah. It is a term "from the beginning of 1215 Fusli to the period of the continuance of my mokurruri." Then it is required that the lessee should cultivate, "and pay into my treasury the sum of Sicca Rs.606, the rent of the mouzah aforesaid, for the period aforementioned, according to the instalments year after year." Then there is this provision, "If hereafter the authorities desire to make a settlement of the property at that time, he shall pay the jumma thereof separately according to the Government settlement." It concludes, "Hence these few words are written and given as a pottah to continue during the term of the mokurruri, that it may be of use when required. The annual jumma malguzari, including the malikana, Rs.606."

To ascertain what is the term granted by this pottah, we must see, in the first place, what is the interest which the grantor *Choonee Lall* had. He calls it a mokurruri interest; but whether it be a true mokurruri interest or not, it was evidently the intention of the parties that the grant should endure during the term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words shewing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a mokurruri lease to *Mahomed Buksh*, and that lease after various intermediate assignments was ultimately purchased by *Choonee Lall*, the grantor of the pottah in question. *Choonee Lall* is said to have purchased it in 1807 or 1808. It is also said that he had purchased the proprietary interest in two annas of the mouzah. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining annas, but nothing is heard of them

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in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the pottah in question is a mokurruri interest. The kubulyut of the lease of 1788, signed by *Mahomed Buksh*, is as follows:—"Whereas I have obtained a lease of mouzah *Toee*, zillah *Kosra*, pergunnah *Malda*, the area whereof, by estimation, is 709 bighas 10 cottahs, from 1196 (one thousand one hundred and ninety-six) Fusli, at a jumma of Sicca Rs.400"—with certain exceptions—"I do acknowledge and give in writing that I shall continue to pay the rent of the mouzah aforesaid at the said jumma, year after year, according to the kubulyut and the kistbundi. If any one establish his zemindary (proprietary) right in respect of the said mouzah in his own name before the authorities, I shall continue to pay, year after year, to him or his heirs, the 'malikana' (proprietary allowance) thereof at the rate of Rs.10 per cent. on the jumma aforesaid, in addition to the Government revenue." The lessee is to pay a jumma of Rs.400, and a malikana of 10 per cent. on the jumma. Of course, if Mr. *Leith* is right, that *Choonee Lall* became the owner of the proprietary interest, the malikana would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion: "If the present officers of the British Government, or any authority who may come hereafter, do not accept my mokurruri lease to be hereditary, I acknowledge that this kubulyut is only for one year, thereafter it shall be cancelled." That undoubtedly acknowledged a power in the Government to put an end to this lease, which is called a mokurruri lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with the proprietors for the revenue, and in that case would put an end to this mokurruri. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to; and although it is not perhaps properly a mokurruri, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a mourussi pottah. This being the interest of *Choonee Lall* (he having become the purchaser of this pottah), he grants this lease to *Nirput Singh* to endure during the continuance of it.

That interest, which continues, and has not been determined by the British Government, being an hereditary interest, there seems to be no reason why, upon the construction of the pottah in question, it should be held to be limited to the life of *Nirput Singh*. As already observed, the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after *Nirput Singh's* death his heirs were allowed to remain in possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Agent for the Appellants: *T. L. Watson.*
Agents for the Respondents: *Barrow & Barton.*

J.C.* 1877 June 20, 21; July 19.

MAHARAJAH PERTAB NARAIN SINGH . PLAINTIFF;

AND

MAHARANEE SUBHAO KOOER, AND OTHERS DEFENDANTS.

ON APPEAL FROM THE COURT OF THE COMMISSIONER, FYZABAD, OUDH.

Act. I. of 1869, *sect.* 22, *cl.* 4—*Son of Talukdar's Daughter "treated by him in all respects as his own son"—Parol Revocation of Hindu Will.*

Wherever it is shewn by sufficient evidence that a talukdar not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such daughter's son will be entitled to succeed to the talukdaree estate under Act I. of 1869, sect. 22, cl. 4.

A verbal authority given by a Hindu testator to a third party to destroy his will, although the instrument is not in fact destroyed, is sufficient in law to constitute a revocation.

Semble, a declaration by such testator to the principal officer of the district of his desire and intention that the Appellant should succeed him by virtue of a newly-passed statute (Act I. of 1869), and in supersession of the will, would have been in law a sufficient parol revocation of the will.

APPEAL from a decree of the Commissioner of *Fyzabad* (December 24, 1873) confirming that of the Deputy-Commissioner of the same place (July 28, 1873).

The object of the Appellant's suit (brought November 21, 1872) was to obtain a declaratory decree as to his right to succeed to the estates of Maharajah *Man Singh*, who died on the 11th October, 1870, on the ground, according to the contention raised in this appeal, that the latter had died intestate, and that he, the Appellant, as a daughter's son who had been treated by *Man Singh* in all respects as his own son was, under the *Oudh Estates Act*, 1869, sect. 22, cl. 4, entitled to succeed in preference to the Respondent, the childless widow of *Man Singh* who had died without male offspring.

The Respondent contended that under a will of *Man Singh*,

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published on the 22nd April, 1864, and which remained unrevoked at his death, she was entitled to succeed to the estate of her husband, and was further empowered by his will to "nominate a successor," which power she stated that she had exercised by executing a will in favour of *Triloki Nath*, her husband's brother's son.

The Appellant admitted the execution by *Man Singh* of the instrument propounded by this Respondent as a will; but he contended that it was not testamentary, and that *Man Singh* had in his lifetime ordered it to be "taken back and destroyed," and that it was through the mistake of Government officers that this had not been done.

The Respondent also denied that the Appellant had been treated by *Man Singh* as a son, or otherwise than as a daughter's son who lived in his grandfather's house.

The Deputy Commissioner held that the instrument in question was, and purported to be a will, and was not revoked by him, and that though *Man Singh* had apparently contemplated the exercise of the power of appointment in favour of the Appellant, yet as it had been conferred absolutely, and the Respondent had not thought proper to exercise it in the Appellant's favour, but in that of another, the Appellant had no right to the declaration which he sought, and his suit must therefore be dismissed.

Upon the question as to whether *Man Singh* had treated the Appellant as a son, so as to bring him, had *Man Singh* died intestate, within sect. 22, clause 4, the Deputy Commissioner was of opinion that *Man Singh's* treatment of the Appellant "was of such a character as the 4th clause of sect. 22, of Act I. of 1869 contemplates, and that if the Maharajah had died intestate it would fully have qualified Appellant to succeed to the estates."

Both parties having appealed, the Commissioner of *Fyzabad* dismissed the Plaintiff's appeal, affirming the judgment of the Deputy Commissioner as to the testamentary character of the instrument propounded as *Man Singh's* will, and its non-revocation; but differing from the Court below as to the proof of the alleged treatment of the Appellant by *Man Singh* as a son, as to which the Commissioner expressed his conclusion as follows:—

"On the whole, I find that the treatment of *Dadwa Saheb*, by

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Maharajah *Man Singh*, was not such as would denote definitely that he had acquired, or should acquire, all the rights of sonship, or in other words, that he did not treat him in all respects as his son."

The facts of the case are fully stated in the judgment of their Lordships.

Leith, Q.C., and *Graham*, for the Appellant, contended that upon the evidence Sir *Man Singh* died intestate, having by his declarations and acts revoked the document treated as a will dated the 22nd of April, 1864. Upon the question of revocation of wills and what was sufficient in law to constitute the same, they referred to *Ex parte The Earl of Ilchester* (1); *Walcott* v. *Ochterlony* (2); where the cases on the subject are collected. They also referred to sect. 21 of Act I. of 1869, and to *Doe* d. *Reed* v. *Harris* (3).

Cowie, Q.C., and *Doyne* (*Thomas* with them), for the Respondents, contended that there were concurrent judgments of the Courts below as to the proof of the will of *Man Singh* and its non-revocation by him, and that those findings of fact were sufficient to deprive the Apellant of all cause of action. If *Man Singh* died testate, then of course Act I. of 1869, sect. 22, cl. 4, did not apply. Assuming his intestacy, they contended that the judgment of the Commissioner was right in holding that the evidence established no such exceptional treatment of the Appellant as would entitle him to set aside the rights of the Respondent under the ordinary Hindu law and to oust her from the possession of her husband's estate. Reference was made to *Lemann* v. *Bonsall* (4).

Leith Q.C., replied.

1877 *July* 19.

The judgment of their Lordships was delivered by

SIR JAMES COLVILE:—

The question raised by this appeal is the right of succession to the taluk of the late Maharajah Sir *Man Singh*, one of the most

(1) 7 Ves. 348.
(2) 1 Curd. 580; 1 Wms. Saund. p. 279 b. (6th Ed.), and 278 i.
(3) 8 Ad. & E. 1; see p. 10 of Lord *Denman's* judgment.
(4) 1 Adams' Ec. Rep. p. 389.

considerable, if not the most considerable, of the great landholders of *Oudh*, whose status and rights are the subject of Act I. of 1869.

The Maharajah died on the 11th of October, 1870. He had no male issue. His nearest surviving relatives were his widow, the Mahranee *Subhao Kooer*, a daughter by a deceased wife, and the Appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the Appellant, was known in the family as "*Dadwa Sahib*" by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to *Man Singh* before the annexation of *Oudh*. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as talukdar was duly confirmed by sunnud. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from *Buktowar Singh*, the preceding proprietor, to his nephew, *Man Singh*, though the youngest of three brothers. Accordingly, when the lists prescribed by sect. 1 of Act I. of 1869 were made up, the name of *Man Singh*, as talukdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd of April, 1864, *Man Singh*, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district a document, which is in these words:—

"I, Maharajah *Man Sing*, &c., Talukdar of *Shahgunge, Gonda*, &c., do hereby declare that as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorized to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and

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deposited it in a public office, that it may serve as a document, and prove of use when required."

Mr. *Simson*, the then Commissioner, made the following indorsement on the will:—"April 22, 1864. Maharajah *Man Singh* this day in person signed this document in my presence, and then delivered it to me as his last will and testament;" and wrote on the envelope within which it was inclosed, "Within this sealed envelope is Maharajah *Man Singh's* will. I forward the envelope to the Deputy Commissioner of *Fyzabad*, with instructions to lodge it, sealed as it is, in the Treasury; and each Treasury officer will note it in his receipt on giving or receiving charge. Of course the Maharajah may reclaim this on a written application properly authenticated at any time."

After the death of the Maharajah, and in November, 1870, this will was opened, and under it the Maharanee was put into possession of the taluk. She afterwards, by a document dated August 16, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the Respondent *Triloki Nath*, who was a son, then under age, of one of the late Maharajah's brothers, and had married her own niece.

Shortly after this transaction the Appellant, *Dadwa Sahib*, instituted this suit, praying for a declaration of his title to the succession to the Maharajah's estate, and for the cancellation of the document of the 22nd of April, 1864 (the will); that of the 16th of August, 1872 (the appointment); and the order of the revenue authorities of the 11th of November, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the Appellant could only succeed in his suit by establishing both the following propositions:—

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April, 1864, was revoked or became inoperative in his lifetime.

2. That the Appellant is entitled to succeed to the taluk as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of the 4th clause of sect. 22 of Act I. of 1869, it being clear that as a

mere grandson by a daughter he would not be the heir *ab intestato* to the taluk under the special canon of succession to intestate talukdars established by that section of the statute.

The Court of first instance and the Appellate Court in *Oudh* have concurred in determining the first of these issues against the Appellant. The second of them was found in his favour by the Court of first instance, but that decision was reversed by the Appellate Court.

In dealing with this appeal their Lordships propose to consider, in the first instance, whether the Appellant has established that he was treated by the late Maharajah "in all respects as his own son," within the meaning of the enactment in question, and is consequently the person entitled to inherit the taluk, if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in *Oudh* as to the construction to be put upon it. One passage in the Commissioner's (Mr. *Capper's*) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindu law, involving the legal consequences of such an adoption, as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the Appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu law. They apprehend that a Hindu grandfather could not, in the ordinary and proper sense of the term adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of a daughter's son, a "patricá-puttra," or son of an *appointed* daughter. Such an act, if it can now be done, would be

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strong evidence of an intention to bring the grandson within the 4th clause, but is not therefore essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd section, applies to all the talukdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindus, Mahommedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary, then, to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their Lordships are of opinion that wherever it is shewn by sufficient evidence that a talukdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the Appellant by the Maharajah.

It is unquestionable that the Appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindus.

On the other hand, it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that *Dadwa Sahib*, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be,

the act was a natural one. At that time nothing was definitively fixed as to the course of succession to the newly-constituted taluks, except that the talukdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's taluk was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what *boy* is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that *Dadwa Sahib* should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paternâ*, it would have been comparatively easy to nominate a brother or a brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the Shasters, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own "gotra." And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will appears in some measure from the evidence of *Anunt Ram*, his dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867 the ceremony of the janeo, or investiture of the Ap-

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pellant with the Brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house, that the Maharajah took that part in the ceremony which in the ordinary course of things would be assumed by the boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the Maharajah's gotra, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. *Capper*, are unable to affirm.

The next important event in *Dadwa Sahib's* history was his marriage in 1868 to the daughter of *Darogha Ramdan*. It seems to be clearly established that on that occasion the Maharajah wrote the two following letters to the father of the bride. The first is in these words:—

"*Lallah Tulsiram* came to me and verbally mentioned to me all the facts. I have, in my former letter, already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared *Dadwa* to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel *Barrow*, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows:—

"I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of *Dadwa*, but you know very well that I have declared no one to be my heir except *Dadwa*, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? *Dadwa* has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my

wife, so you should be satisfied, and make preparations for the marriage."

These letters no doubt are no legal revocation of the will. They seem rather to recognise the continued existence of a will. But they are pregnant evidence to shew that the Maharajah's inclinations in favour of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named *Dadwa Sahib* in the will as his successor, or had instructed his wife to exercise her power of appointment in *Dadwa's* favour. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late *Nowring Singh*, and contains the words:—"Do not regard this as a customary invitation. *Dadwa Sahib* is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter-book.

The documentary evidence which has just been considered is far more important, as direct evidence of this intention of the Maharajah, than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the Plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the Defendants.

There is, again, come conflict of evidence as to the fact whether

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the Appellant bore the title of Kowar. There is, however, some evidence that the title was often conceded to him, though he is not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important occasions sat on the Gudder with the Maharajah; of his having been introduced by the Maharajah's desire to European officers high in authority; of his having been taken to the durbar of the Governor-General and put prominently forward there; and it cannot be doubted that the effect of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of Talukdars, went down to *Calcutta* in order to take part in the discussions and negotiations which resulted in the passing of Act I. of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the vakil concerned in the drafting and preparation of this Act on the part of the talukdars, has sworn that clause 4 of the 22nd section originated with the Maharajah; that it was opposed by some of the talukdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the bill and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the *Dadwa Sahib*.

There is some contradictory evidence on this point on the part of the Defendants. One of their witnesses, however, *Chowdree Niamut Khan* seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahommedan rather than for that of the Hindu talukdars. He says, "I asked Maharajah *Man Singh* what the object was of the clause in question, and he informed me that in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindu law, but under the Mahommedan law they have; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindu law might not be contravened."

It is not easy to see why the Maharajah should have been thus anxious to originate a clause that was to enure only for the benefit of Mussulman talukdars.

The scale, however, is conclusively turned in favour of the testimony of *Imtiaz Ali* on this point by the evidence of Mr. *Carnegy*.

Mr. *Carnegy*, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharajah in January, 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a clause inserted in Act I. of 1869 to suit the identical case of the *Dadwa*. That statement is very material, inasmuch as it shews that the Maharajah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. *King*), speaking possibly in some measure from personal knowledge, says:—"It is not saying too much the Court believes to say that if the Plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the *Dadwa Sahib* his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention as early as the date of the *Dadwa Sahib's* marriage; that, with that intention, he continually treated his grandson, in fact, as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the statute.

They are further satisfied that the treatment, in point of fact, was such as the words of the clause, upon the true construction of it, must be held to contemplate; and that, in the events that have happened, the Appellant was the statutory heir to the taluk, if the Maharajah is to be held to have died intestate.

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They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from *Calcutta*, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that, having been at so much pains to make *Dadwa Sahib* his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will and by the act of the Maharanee. Moreover, his conduct and what we are told of his character make it probable that, even if he thought the succession of *Dadwa* was secured either by the terms of the will or by further instructions given to the Maharanee, he would now desire it to be effected by operation of law rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. *Carnegy* has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. *Carnegy's* deposition are the following:—

"He spoke to me about having it (the will) withdrawn from the Treasury on the eve of my departure on tour across the *Gogra* (Mr. *Sparks'* evidence fixes the date of this as some time in January,

1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the *Dadwa Sahib;* that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family; and that if on examination of the document I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the *Dadwa* should succeed him; and he had had a special clause inserted in Act I. of 1869 to suit the identical case of the *Dadwa*, so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the *Gogra* on tour, and was absent several weeks. I wrote demi-officially to Mr. *Sparks*, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. *Davies*, who I remember said that if the will was sealed up and deposited by the Commissioner, I, as officiating Commissioner, might open it; but if sealed and deposited under orders of the Chief Commissioner, I had better not open it myself. Mr. *Sparks* unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to *Fyzabad* I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869–70."

And in cross-examination he said: "The Maharajah wished his will to be destroyed that the *Dadwa Sahib* might get the benefit of the 22nd section of Act I. of 1869. He said there was no need of the document as the clause secured his wishes."

The first objection to Mr. *Carnegy's* evidence is that it is not corroborated by that of Mr. *Sparks*, which is also given in the cause. He says, touching this point, "To the best of my recollection, Mr. *Carnegy* never wrote to me to send him the will. Mr. *Carnegy*, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Office to get out the will and see by whom it was deposited, which copy I dispatched to Mr. *Carnegy*. I did not receive any letter.

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official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. *Carnegy* asking me to return the will, nor did I receive any khutt from the Maharajah. I don't remember receiving any."

Upon this testimony, it is to be remarked, that it confirms that of Mr. *Carnegy* as to the fact that at the time in question he made some communication to Mr. *Sparks* touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. *Carnegy's* general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. *Carnegy* was examined on the 19th of April, 1870, when on the eve of his departure for *Europe*. Mr. *Sparks* was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. *Carnegy*, and getting him to explain if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. *Carnegy*, after the discussion with Mr. *Davies* to which he deposes, may have written to Mr. *Sparks* to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. *Carnegy*, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. *Davies*. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. *Carnegy* had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. *Carnegy* are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and notwithstanding

frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and, above all, why, after the death of the Maharajah, he allowed the widow to be put into possession of the taluk, under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. *Carnegy* whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the dispatch of the document; that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. *Carnegy* is confirmed by Mr. *Sparks*. Mr. *Carnegy* seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. *Carnegy's* sincere conviction, it may well account for his not acting after his return on the antecedent authority by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act, if assured that it would be confirmed, if necessary, by a person in the full possession of his faculties, would naturally abstain from doing it if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to its legal revocation; and that, if he objected to the Maharanee's title on the ground of what had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the *Dadwa Sahib*, whose interests he may have supposed, in common with other officials, and many of the dependents of the family, would be secured by the Maha-

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ranee's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. *Carnegy's* conduct can be completely explained, bnt whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. *Carnegy's* recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by *Carnegy*, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. *Carnegy's* subsequent conduct, he came to the conclusion that "*Man Singh* only expressed an intention that the *Dadwa Sahib* should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expressed a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. *Carnegy* be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. *Sparks;* but mere imperfection of memory can hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. *Carnegy's* statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a Hindu may be revoked by parol. The cases cited at the bar shew that this was the law of *England* before the *Statute of Frauds* was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in *India* in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. *Carnegy* is open to the objections which have been considered. It was hardly disputed at the bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott* v. *Ochterlony* (1), the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the *Statute of Frauds*. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. *Carnegy's* testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the Maharajah to the principal officer of the district in whose custody the will was, of his desire and intention that the *Dadwa Sahib* should succeed him by virtue of the newly-passed statute, and in supersession of the will, would have been in law a sufficient parol revocation.

(1) 1 Curt. 580.

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Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the Appellant is the person who, under clause 4 of sect. 22 of Act I. of 1869, was entitled to succeed to the taluk; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the taluk and what passes with it. If the Maharajah had personal or other property not properly parcel of the talukdaree estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of *Fyzabad*, dated the 24th of December, 1873, and that of the Deputy Commissioner of *Fyzabad*, dated the 28th of July, 1873; and to declare that the will of the late Maharajah *Man Singh* of the 22nd of April, 1864, was duly revoked by him in his lifetime; and that the Plaintiff, Maharajah *Pertab Narain Singh, alias Dadwa Sahib*, was and is entitled, under clause 4, sect. 22 of Act I. of 1869, to succeed, as *ab intestato*, to the talukdaree estate of the late Maharajah, including whatever is descendible according to the provisions of the said statute. Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the talukdaree estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

Agents for the Appellant: *Watkins & Lattey.*
Agent for the Respondent: *T. L. Wilson.*

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ON APPEAL FROM THE HIGH COURT OF BENGAL.

Mitakshara Joint Estate—Sale of Share in Execution—Rights of Purchaser.

The rights and proprietary and mokurruri title and share of a Hindu father in the joint family estate under Mitakshara law having been seized and sold in execution of a decree against him, possession of the whole estate was delivered to the Appellant as purchaser.

In a suit by the Respondent, the son of the judgment debtor, to recover the same on the ground that it could not be sold in execution without proof of legal necessity for the debt:—

Held, assuming that a member of a Mitakshara joint family may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his co-parceners, that the Appellant, as purchaser at an execution sale of such share, was entitled to ascertain the same by such partition as the judgment debtor might have compelled before the alienation of his share took place.

APPEAL from a decree of the High Court (June 14, 1873), on a special appeal by the above-named Respondent against a decree of the Judge of *Gyah* (March 28, 1872).

The facts of the case and the proceedings in the suit out of which the appeal arose are sufficiently set forth in the judgment of their Lordships.

Graham, for the Appellant, after contending that upon the evidence the necessity for the loan which led to the decree had been established, and that the Respondent had been shewn to be a party thereto, argued that the right, title, and interest of the father in his ancestral property having been seized and sold in execution for a debt of the father, the son could not, even under the Mitakshara law, claim to set aside such sale without payment of his father's debt. Assuming that the son had such an interest in the ancestral estate as to prevent its seizure for the father's debt, still the estate having been seized and sold and possession

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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delivered to the Appellant, the proper remedy for the Respondent was to claim against him the same right of partition which according to the Mitakshara law the son has against the father, and in such partition suit the son in the lifetime of his mother capable of bearing issue would have but a small share. [He referred to *Mahabeer Persad* v. *Ramyad Singh* (1).] Assuming the ruling of the *Bengal* Full Bench in *Sadabart Persad Sahu* v. *Phoolbash Koer* (2) (as to which see *Mussumut Phoolbash Koonwur* v. *Lalla Jogeshur Sahoy* (3)) to be correct, a broad distinction exists between a voluntary conveyance by a member of a Mitakshara joint family of his share and the seizure and sale of the same by a Court of Justice in execution of decrees against him. The current of *Madras* authorities, however, is in favour of the validity of a voluntary alienation of his share by a member of a Mitakshara joint family without the consent of his co-sharers: see 2 *Strange's* Hindu Law, p. 344; *Virásvámi Grámini* v. *Ayyasvami Grámini* (4); *Palani Velappa Kaundan* v. *Mannaru Naickan* (5). See also *Trimbak Anant* v. *Gopalshet* (6); *Damodhar Vithal Khare* v. *Damodhar Hari Soman* (7). [He referred also to *General Manager of Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (8).]

The Respondent did not appear.

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July 25.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Respondent in this case is the only son of one *Toofani Singh*, and, the family being governed by the law of the Mitakshara, is joint in estate, in the strict sense of the term, with his father. On the 28th of January, 1863, the father being indebted to the Appellant to the amount of Rs.5000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent. per annum. The Appellant afterwards put this bond in suit, and on the 30th of May, 1864, obtained a decree against *Toofani Singh* for the sum of Rs.6328 13*a*. 8*p*.

(1) 12 Beng. L. R. 90.
(2) 3 Beng. L. R. (F.B.) 31.
(3) Law Rep. 3 Ind. App. 7.
(4) 1 Madras, H. C. R. 471.
(5) 2 Madras H. C. R. 416.
(6) 1 Bomb. H. C. R. 32.
(7) Ibid. 182.
(8) 14 Moore's Ind. App. Ca. 605.

He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money, against the property especially hypothecated; but in September, 1870, caused "the rights and proprietary and mokurruri title and share of *Toofani Singh*, the judgment debtor" in the joint family property which is the subject of this suit, to be put up for sale in two lots for the realisation of the sum of Rs.11,144 6*a.* 4*p.*, the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs.900 and Rs.10,100. Objections were taken to this sale by the judgment debtor, which, after going through all the Courts, were finally overruled, and the Appellant obtained the usual certificate title, and in January, 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February, 1871, the Respondent brought the suit out of which this appeal arises for the recovery of the whole property on the ground that being according to the law of the Mitakshara the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognised by the Shastras or the law. The father was joined as a Defendant.

The issues on the merits settled in the cause were—

1. Did *Toofani Singh* borrow money from the Defendant (the Appellant) under a legal necessity or without a legal necessity? and are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not?

2. Under the Mitakshara law, is the Plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much?

3. Was some portion of mouzah *Domawun* personally acquired by the Plaintiff's father, or was it acquired by the ancestral funds and property?

A good deal of evidence was given in the Court of first instance as to the nature of the debt incurred by *Toofani Singh*, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the Plaintiff was directed to shew

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that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand, the Defendant (the Appellant) brought witnesses to prove that part at least of the money, viz., Rs.1500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the Plaintiff was cognisant of his father's transactions, and the whole debt one which bound both co-sharers.

The subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says, "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says, "The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment debtor, cannot be regarded as including the right of the son of the judgment debtor which he derived under the Shastras; and so far as the Plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded; for he gave the Plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of *Gyah*, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to *Toofani Singh*, but the whole undivided estate was liable for the debt.

The Respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th of June, 1873, reversed the decree of the Lower Appellate Court, and ordered that the Plaintiff should obtain possession from the Defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was

addressed to the question of the nature of the judgment debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the Appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugenderchunder Ghose* v. *Srimutty Kaminee Dossee* (1) and *Baijun Doobey* v. *Brij Bhookun Lall Awasti* (2).

The first and principal question, however, that arises on this appeal is, whether the Appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitakshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In lower *Bengal*, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the Dayabhaga, the rights which they have under the law of the Mitakshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of

(1) 11 Moore's Ind. App. Ca. 241. (2) Law Rep. 2 Ind. App. 275.

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the judgment debtor, and acquires the right as against the other co-sharers to compel a partition.

That a similar rule prevails in the south of *India*, though the law there administered is founded on the Mitakshara, is shewn by two cases decided by the High Court of *Madras*: *Virásvámi Grámini* v. *Ayyasvami Grámini* (1), and *Palani Velappa Kaundan* v. *Mannaru Naickan* (2). The latter case was one in which, as here, the co-parceners were father and son. And that the law is to the same effect in the Presidency of *Bombay* was ruled in the two cases which are reported at pp. 32 and 182 of the first volume of the *Bombay* High Court Reports.

All these cases, however, affirm not merely the right of a judgment creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of *Bengal*.

In 1869 the question was carefully considered by the High Court of *Calcutta*. A Division Bench of that Court referred it to a Full Bench in the case of *Sadabart Persad Sahu* v. *Phoolbash Koer*.

The decision of the Full Bench is reported in the third volume of the *Bengal* Law Reports, Full Bench Rulings, p. 31. The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitakshara, as administered in the Presidency of *Fort William*, "*Bhagwan Lall*," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment, which is reported in the Law Rep. 3 Ind. App. p. 7, did not think it necessary or expedient

(1) 1 Madras H. C. R. 471. (2) 2 Madras H. C. R. 416.

either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships (p. 30) said they "abstained from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration recognised a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice, at p. 37 of the Report, says:—

"It is unnecessary for us to decide whether, under a decree against *Bhagwan* in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in *Stokes'* Reports, it might have been seized, but the case as against *Bhagwan* and that against the survivors are very different. So long as *Bhagwan* lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabart's Case* has been followed by, amongst others, that of *Mahabeer Persad* v. *Ramyad Singh* (1), being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially

(1) 12 Beng. L. R. 90.

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hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (see p. 94) the law as established by the Full Bench ruling in *Sadabart's Case*, and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment debtor, should be subject to the lien of the judgment creditor for the money advanced, with interest. In the present case the same Judges have refused to recognise any such equity, proceeding on the ground that the execution was taken out not against the property specially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabart's Case*. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the Lower Appellate Court that "legal necessity to borrow the money existed;" whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the Defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the presidency of *Fort William* which is governed by the Mitakshara, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his co-partners, the purchaser of it at an execution sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at *Madras* and *Bombay;* except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabart's Case,* and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in *Bengal* as that which exists in *Madras.* They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's Case* as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property,

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to be restored to the Respondent. But they think that the decree should be varied by adding a declaration that the Appellant, as purchaser at the execution sale, has acquired the share and interest of *Toofani Singh* in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to *Toofani Singh's* share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

Agents for the Appellant: *Watkins & Lattey.*

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ACT VIII. OF 1859, sect. 2: *See* LIMITATION.

—— **sect. 208**: *See* EXECUTION PROCEEDINGS.

ACT XIV. OF 1859, sects. 20, 21: *See* LIMITATION.

ACT XXIII. OF 1861, sect. 11: *See* EXECUTION PROCEEDINGS.

ACT I. OF 1869.] In a suit brought by some members of a joint Hindu family for a declaration of right against another member thereof, alleging that the Defendant being kabooliatdar of a certain taluka in *Oudh* on behalf of the joint family, obtained a sunnud in his own name, and intended to deprive the Plaintiffs of their rights, notwithstanding an admission made by him that they were entitled to shares:—*Held*, that a person who has been registered as a talukdar under Act I. of 1869, and has thereby acquired a talukdary right in the whole property, may nevertheless have made himself trustee of a portion of the beneficial interest in lands comprised within the taluka for another and be liable to account accordingly.—*Shunkur Sahai* v. *Rajah Kashi Pershad* (Law Rep. 4 Ind. App. 198), approved.—Case remanded accordingly to try whether notwithstanding the summary settlement, the sunnud, and the statute, the Plaintiffs or either of them had either before or after the passing of Act I. of 1869 acquired or become entitled to a beneficial interest in any part of the property.—Although the decision of the Commissioner in this case, affirming the decision of the settlement officer, was final under sect. 4 of Act XXXII. of 1871, the Commissioner's Court, being subordinate to that of the Judicial Commissioner, was not a Court of highest civil jurisdiction in the province within the meaning of Act II. of 1863, sect. 1. THAKOOR HARDEO BUX *v.* THAKOOR JAWAHIR SINGH 178

2. —— Wherever it is shewn by sufficient evidence that a talukdar not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such daughter's son will be entitled to succeed to the talukdary estate under Act I. of 1869, sect. 22, cl. 4.—A verbal authority given by a Hindu testator to a third party to destroy his will, although the instrument is not in fact destroyed, is sufficient in law to constitute a revocation.—*Semble*, a declaration by such testator to the principal officer of the district of his desire and intention that the Appellant should succeed

ACT I. of 1869—*continued.*

him by virtue of a newly-passed statute (Act I. of 1869), and in supersession of the will, would have been in law a sufficient parol revocation of the will. MAHARAJAH PERTAB NARAIN SINGH *v.* MAHARANEE SUBHAO KOOER - - 228

3. —— In a suit against the Respondent pending the regular settlement of taluk *Sessendee* to establish Plaintiff's right to a direct settlement with her of four villages, and of a one-third share in seven others out of the twenty-six villages of which the taluk was composed; it appeared that the Respondent had before judgment obtained a sunnud of the whole taluk, his name being entered in the second schedule to Act I. of 1869, and further that he had admitted himself to be trustee for the Plaintiff as respects the said one-third share of seven villages. It also appeared that the Plaintiff was entitled to a sub-settlement of the said four villages:—*Held* (1), that the Plaintiff could not establish talukdary rights, for, having no interest in many of the villages, in order to make her a talukdar it would be necessary to reform the sunnud and break up the existing settlement and resettle the estate in three different portions. *Quære*, whether the sunnud could be reformed after Act I. of 1869, without a special Act of the Legislature. (2) The Plaintiff could not under the summary settlement and the order of the 10th of October, 1859, acquire proprietary rights as against the Respondent, who was sole hereditary proprietor of the taluk before the summary settlement, and whose rights were reserved under the Proclamation. (3) The summary settlement not having been made with the Plaintiff *as talukdar*, neither it nor the order of 1859 conferred talukdary rights upon her. *Held*, lastly, that the Plaintiff was entitled to a Hindu widow's estate of inheritance in the said four villages, and in a one-third share of the profits of the said seven villages, and to have a settlement of the four villages on terms of paying to the talukdar the Government demand *plus* 10 per cent. *Quære*, whether the effect of the letter of October, 1859, and the subsequent legislation is to relieve a Hindu widow, though a talukdar, from the disabilities imposed upon her by the general law. WIDOW OF SHUNKER SAHAI *v.* RAJAH KASHI PERSHAD - - 198

4. —— In a suit brought in 1867 to establish Plaintiff's right to a talukdary in *Oudh*, as grandmother and heiress to a deceased infant Rajah, with whom a summary and temporary settlement thereof had been made; it appeared that the taluk had been, after the death of the infant Rajah, and be-

ACT I. of 1869—*continued.*
fore the letter of the 10th of October, 1859, resumed by the Government:—*Held*, that the Plaintiff as heir of a talukdar who had been permitted to engage for the revenue, but who had died before the letter of the 10th of October, 1859, was not entitled to the permanent hereditary and transferable proprietary right described thereby, but which had never vested in the deceased Rajah. Act I. of 1869, did not apply to the case. RANEE OF CHILLAREE *v.* THE GOVERNMENT OF INDIA - - 208

ACT VIII. OF 1871, sect. 4: *See* REGISTRATION.

ACT XXXII. OF 1871, sect. 4: *See* ACT I. OF 1869.

ADOPTION BY A WIDOW AFTER SUCCEEDING AS HEIRESS TO HER SON.] In a suit by an adopted son to recover the zemindary in suit (situate in the *Dravada* district), it appeared that the original zemindar having left a son the zemindary vested in him, that on his death a minor and unmarried it vested in the widow as heiress to her son, that she some years later adopted the Appellant without a written authority from her husband, but with the consent of his surviving sapindars, all requisite ceremonies being complied with:—*Held*, that the adoption being in derogation of the adoptive mother's estate, although she had taken the same in succession to her son and not to her husband, was valid.—*Bhoobunmoyee Dabee* v. *Ram Kishore Acharj Chowdhry* (10 Moore's Ind. App. Ca. 279) distinguished.—Secondly, the High Court was wrong, upon the evidence, in holding that there had not been such an assent upon the part of the kinsmen as to shew that the act of adoption was done by the widow in the proper and *bonâ fide* performance of a religious duty.—The *Ramnad Case* (*Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 Moore's Ind. App. Ca. 397) explained.—It would be dangerous to introduce into the consideration of adoption cases nice questions as to the particular motives, so long as they are neither corrupt nor capricious, operating on the mind of the adoptive widow. RAJAH VELLANKI VENKATA KRISHNA ROW *v.* VENKATA RAMA LAKSHMI NARSAYYA - - - - - - - - 1

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ALIENATION: *See* DEWUTTUR PROPERTY; RIGHT OF MANAGEMENT OF A PAGODA.

ASSENT OF SAPINDAR: *See* ADOPTION BY A WIDOW AFTER SUCCEEDING AS HEIRESS TO HER SON.

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CAUSE OF ACTION: *See* DISPOSSESSION OF SECOND BY FIRST MORTGAGEE.

CHAMPERTY AND MAINTENANCE.] The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mesne profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be re-

CHAMPERTY AND MAINTENANCE—*continued.*
paid all advances with interest at 12 per cent., and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and thereafter conducted the appeal in his own interest.—In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damage from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—*Held*, that the English laws of maintenance and champerty are not of force as specific laws in *India*.—A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.—Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.—Such agreement created no legal privity between the Appellants and the Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded: nor does it establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.—An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause.—*Cotterell* v. *Jones* (11 C. B. 735) approved. RAM COOMAR COONDOO *v.* CHUNDER CANTO MOOKERJEE - - - 23

CONCURRENT JUDGMENTS ON FACT ALLOWED TO BE DISPUTED: *See* MITAKSHARA LAW. 1.

CONSTRUCTION.] A pottah having been granted in 1808 to the Respondent's ancestor, "to continue during the term of the mokurruri" of the grantor; it appeared that the grantor's kubulyut, dated in 1878, acknowledged the power of the Government (which, however, had not been acted upon) to put an end to the lease of that date at the end of one year.—In a suit by the Appellants, who derived title from the said grantor, to annul the mokurruri tenure claimed by the Respondents, *held*, that the grant to the ancestor of the Respondents was not of an indefinite nature, enuring only for the life of the grantee, but passed to his heirs the whole

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CUSTOM: *See* RIGHT OF MANAGEMENT OF A PAGODA.

DAYABHAGA: *See* HINDU LAW.

DESHMUKHS: *See* PENSION ACT, 1871.

DEWUTTUR PROPERTY.] In a suit to set aside certain alienations of an ancestral mehal on the ground that the mehal had been dedicated to the worship of an idol, the defence was (1) that the estate had not been so dedicated; (2) that if it were, there was legal necessity for the alienation. —The deeds of transfer contained recitals that the estate transferred was dewuttur, that the temple was out of repair, and that the purchase-money was wanted to restore it:—*Held* (1) on the evidence that the estate was not dewuttur; (2), that the admissions in the deeds must be taken as a whole, and according to them the sales were justifiable, even if the property were dewuttur; (3), that even if part only of the purchase-money was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ fide* believed by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. KONWUR DOORGANATH ROY *v.* RAM CHUNDER SEN - - - - - 52

DISPOSSESSION OF SECOND BY FIRST MORTGAGEE.] In a suit brought in 1872 by the representatives of a second mortgagee to recover possession of the mortgaged land from the representatives of the mortgagor, it appeared that the second mortgagee had been placed in possession thereof in 1846 by decree of Court, but had in 1847 been dispossessed at the suit of the first mortgagees, upon whose being paid off in 1870 the mortgagor re-entered upon the land:—*Held* (reversing the decision of the High Court of *Allahabad*), that such entry gave a cause of action to the second mortgagee, and that he was entitled to resume possession of the mortgaged land. The decree of the first Court, which was in favour of the Appellants, was also reversed, so far as it decreed interest upon the mortgage-money during dispossession. NARAIN SINGH *v.* SHIMBHOO SINGH [15

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EFFECT OF CERTIFICATE: *See* REGISTRATION.

EXECUTION OF DECREE FOR MONEY: *See* LIMITATION.

EXECUTION PROCEEDINGS.] The widow of a decree-holder, having been substituted on the record under sect. 103 of Act VIII. of 1859 for the purpose of prosecuting an appeal, applied for execution on behalf of herself and as guardian of her infant son, whose legitimacy as a son of the deceased decree-holder was disputed and eventually decided in such execution proceeding, and obtained a declaration that she was entitled to execute the whole of her decree against the judgment debtor.—In a suit by the widow of the judgment debtor to set aside this judgment, *held*, that the above issue of legitimacy had not been

EXECUTION PROCEEDINGS—*continued.*
decided by a competent Court in a competent proceeding.—Neither sect. 208 of Act VIII. of 1859, nor sect. 11 of Act XXIII. of 1861 authorised the Court to try the above issue of legitimacy in an execution proceeding, the infant son not having been a party to the suit in which the judgment was passed. ABEDOONISSA KHATOON *v.* AMEROONISSA KHATOON - - - - - 66

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HINDU LAW.] According to the Dayabhaga a brother of the whole blood in a joint family succeeds in preference to a brother of the half-blood to the share of a deceased brother.—*Rajikshore Lahoory* v. *Gobind Chunder Lahoory* (I. L. R. 1 Cal. 27; 24 Suth. W. R. 234; and note *infra*, p. 153) approved. SHEO SOONDARY *v.* PIRTHEE SINGH - - - - - - 147

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INTEREST ON COSTS CANNOT BE GIVEN IN EXECUTION UNLESS DECREED.] Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.—The existing practice of the Indian Courts not to give in execution interest on costs unless specially decreed, or unless submission is made by the parties to the discretion of the Court, approved. FORESTER *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - 137

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JURISDICTION OF CIVIL COURTS: *See* PENSIONS ACT, 1871.

LIABILITY OF SUNNUD HOLDER TO ACCOUNT: *See* ACT I. OF 1869. 1.

LIMITATION.] A decree for money against the Respondent having been obtained by the Appellant on the 5th of October, 1866, the former made payments on account up to October, 1869: on the 22nd of which month the Appellant made a *bonâ fide* application to execute the same in respect of the unpaid balance. An order to that effect was refused by the Court which made the decree, but the Respondent nevertheless made further payments on account.—On the 4th of May, 1871, a

LIMITATION—*continued.*
fresh application for execution was made, which was eventually again refused, the Chief Court of the *Punjab* holding that the decree having been obtained before the introduction of Act XIV. of 1859 into the *Punjab* the case must be governed by the provisions of sect. 21 and not by sect. 20 of that Act:—*Held*, that this order must be reversed. The application of the 22nd of October, 1869, was a proceeding to enforce the decree within the meaning of sect. 20, and having been taken within three years next preceding the application of the 4th of May, 1871, this last application was not barred by sect. 21.—The prohibition laid down in sect. 20 does not on the true construction of sect. 21 apply to judgments in force at the time of passing the Act.—An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata* or within s. 2 of Act VIII. of 1859. DELHI AND LONDON BANK *v.* MELMOTH A. P. ORCHARD - - - - - - 127

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MITAKSHARA JOINT ESTATE.] The rights and proprietary and mokurruri title and share of a Hindu father in the joint family estate under Mitakshara law having been seized and sold in execution of a decree against him, possession of the whole estate was delivered to the Appellant as purchaser.—In a suit by the Respondent, the son of the judgment debtor, to recover the same on the ground that it could not be sold in execution without proof of legal necessity for the debt:—*Held*, assuming that a member of a Mitakshara joint family may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his co-parceners, that the Appellant, as purchaser at an execution sale of such share, was entitled to ascertain the same by such partition as the judgment debtor might have compelled before the alienation of his share took place. DEENDYAL LAL *v.* JUGDEEP NARAIN SINGH 247

MITAKSHARA LAW.] Concurrent judgments of two Courts on a question of fact allowed to be disputed because the question of fact appeared to be a good deal mixed up with law.—It was contended in a suit to set aside a will, that under Mitakshara law property acquired by a son by successful trading and the exercise of industry and intelligence, became joint in contemplation of law if the nucleus with which he commenced trading was derived from his father, or if he had been educated out of the joint funds of the family:—*Held*, on the evidence, that such nucleus had not been derived from his father, and that the son had not been educated out of any joint fund, but out of the separate estate of the father; otherwise very strong and clear authority would be required to support the above contention, which, if correct, would incapacitate a Hindu who has received any education out of joint funds from ever acquiring separate estate. PAULIEM VALLOO CHETTY *v.* PAULIEM SOORYAH CHETTY - - - 109

2. —— The illegitimate son of a Hindu belonging to one of the twice-born classes has a right to maintenance; and an assignment to him by his father before the birth of a legitimate son and heir of ancestral immovable estate for that purpose is valid.—*Quære*, whether, under the Mitakshara law, a father who has no legitimate son is competent to alienate the whole or part of his ancestral estate to a stranger. RAJAH PARICHAT *v.* ZALIM SINGH - - - - - - 159

3. —— According to the Mitakshara law, as it prevails in southern *India*, two or more lawful wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment.—Although widows so taking have no right to enforce an absolute partition of the joint estate between them, they have power to arrange for separate enjoyment of their shares, their respective rights by survivorship and otherwise remaining unaffected.—*Jijoyiamba Bayi Saiba* v. *Kamakohi Bayi Saiba* (3 Madras, H. C. R. 424) affirmed. SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU *v.* SRI GAJAPATHI RADHAMANI PATTA MAHA DEVI GARU - - 212

MOKURRURI POTTAH: *See* CONSTRUCTION.

MOTIVE OF WIDOW IN ADOPTING WITHOUT WRITTEN AUTHORITY OF HER HUSBAND: *See* ADOPTION BY A WIDOW AFTER SUCCEEDING AS HEIRESS TO HER SON.

NON-LIABILITY OF STRANGER TO THE RECORD FOR COSTS OF SUIT IN THE ABSENCE OF MALICE AND WANT OF PROBABLE CAUSE: *See* CHAMPERTY AND MAINTENANCE.

PAROL REVOCATION OF HINDU WILL: *See* ACT I. of 1869. 2.

PENSIONS ACT, 1871, s. 4.] In a suit to recover from the Government certain emoluments due to the Appellant as deshmukh of four mehals, the Appellant alleged in his plaint that he was the hereditary deshmukh thereof; that as such, he and his ancestors had long been entitled to receive from the ryots a percentage upon that part of the revenue which was assessed in cash; that such rights were confirmed by a sunnud granted in 1777; that up to 1842 he received his dues directly from the ryots, but that since 1842 the Government had received them on his behalf, but in respect of the sums claimed had not accounted to the Appellant:—*Held*, that the Judge was right in dismissing the suit before the settlement of issues, on the ground that it was excluded from the jurisdiction of the Civil Courts by the *Pensions Act*, 1871, s. 4. The deshmukh's right, in its inception and original character, and under the terms of the sunnud, is within the scope and operation of that section; and even as at present existing, irrespective of the terms of the sunnud, would fall within the scope of sect. 3. VASUDEV SADASHEV MODAK *v.* THE COLLECTOR OF RATNAGIRI - 119

POWERS OF DIRECTORS TO BORROW AND MORTGAGE.] By Art. 50 of the articles of association of the *O. R. Company* (which was limited by guarantee, and registered in *Victoria* under a local Act corresponding with the English *Companies Act*, 1862), it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actually paid-up capital." The articles con-

POWERS OF DIRECTORS TO BORROW AND MORTGAGE—*continued.*

tained no restriction upon the company's power of borrowing; and the directors' power to borrow was capable of being extended under Art. 31, by one-half of the votes of all the shareholders given at a general meeting. On the 23rd of December, 1867, the directors obtained a letter of credit, No. 150, for £10,000, and on the 11th of September, 1868, a letter, No. 141, for £5000, and stated to that effect in their report of the 29th of October, 1868, which was ratified at the half-yearly meeting of that date. Letter No. 150 expired on the 29th of March, 1869, but was renewed. On the 9th of September, 1869, the directors obtained another letter of credit, No. 153, for £5000, but this act was never assented to or ratified by the shareholders. In a suit by the Respondent bank to enforce against the Appellapt, as the assignee of the right, title, and interest of the *O. R. Company*, an equitable mortgage which had been granted by the company to secure advances made by the bank, which, with interest, amounted to £15,296, it appeared that half of the actually paid-up capital was never more than £8550; that at the end of 1870 the balance due to the bank was £8; and that the sums claimed in this suit had been advanced in February, 1871, viz. £10,000 under letter No. 150, and £5000 under letter No. 153:—*Held*, that the limitation of the power of borrowing and mortgaging contained in Art. 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding. The ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain a letter of credit No. 153, in September, 1869, or to borrow £5000 thereon in February, 1871. The ratification of letter of credit, No. 150, for £10,000, did not authorize the renewal of it, or the acting upon it after the time originally limited had expired. Although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what is given by Art. 50 that could only be effected by a vote of one-half of all the shareholders of the company. The ratification at a half-yearly meeting of a particular act of the directors in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.—*Royal British Bank* v. *Turquand* (5 El. & Bl. 248; 6 E. & Bl. 327) distinguished. IRVINE *v.* UNION BANK OF AUSTRALIA - - - - - 86

POWER OF FATHER TO ALIENATE ANCESTRAL IMMOVEABLES: *See* MITAKSHARA LAW. 2.

RATIFICATION BY COMPANY OF PARTICULAR ACT OF DIRECTORS DONE IN EXCESS OF AUTHORITY: *See* POWER OF DIRECTORS TO BORROW AND MORTGAGE.

RE-ENTRY OF MORTGAGOR AFTER FIRST MORTGAGE SATISFIED: *See* DISPOSSESSION OF SECOND BY FIRST MORTGAGEE.

REGISTERED TALUKDAR MAY BE TRUSTEE: *See* ACT I. OF 1869. 1.

REGISTRATION.] A deed of sale, purporting to have been made by a Mahomedan woman and her two sons, relating to their separate shares in certain immoveable property, was presented for registration; the two sons admitting the execution thereof by themselves, but denying that by their mother, and objecting to have it registered. The deed, however, was registered by the sub-registrar, but the High Court held improperly so, having regard to Act VIII. of 1871, s. 35, and that therefore the same could not be received in evidence against the sons:—*Held*, that, according to the true construction of sect. 35, the registering officer must refuse to register a document *quoad* the persons denying the execution thereof, and *quoad* any person who appears to be a minor, an idiot, or a lunatic; but the section must not be extended so as to destroy the operation of a deed as regards those who admit the execution thereof, or who are under no disability. A certificate of registration is sufficient to render a document admissible in evidence, without inquiry as to whether the same was properly granted.—*Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (Law Rep. 2 Ind. Ap. 210), approved. MOHAMMED EWAZ *v.* BIRJ LALL - - 166

RES JUDICATA: *See* LIMITATION.

RIGHT OF MANAGEMENT OF A PAGODA.] An assignment from the persons known as the urallers of the *Tracharamana* pagoda and its subordinate chetroms to the Appellant of the uraima right, or right of management thereof, was *held* to be beyond the legal competence of the urallers, both under the common law of *India* and the usage of the foundation. The assignment being of a trusteeship for the pecuniary advantage of the trustee, could not be validated by any proof of custom. RAJAH VURMAH VALIA *v.* RAVI VURMAH MUTHA - 76

RIGHTS OF PURCHASER: *See* MITAKSHARA JOINT ESTATE.

SALE OF SHARE IN EXECUTION: *See* MITAKSHARA JOINT ESTATE.

SEPARATE ENJOYMENT: *See* MITAKSHARA LAW. 3.

SEPARATE ESTATE: *See* MITAKSHARA LAW. 1.

SON OF TALUKDAR'S DAUGHTER "TREATED BY HIM IN ALL RESPECTS AS HIS OWN SON": *See* ACT I. OF 1869. 2.

SUCCESSION OF HALF-BROTHER IN A JOINT FAMILY: *See* HINDU LAW.

SURVIVORSHIP: *See* MITAKSHARA LAW. 3.

UNDUE INFLUENCE: *See* IKRARNAMAH SET ASIDE.

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